SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 553

THE UNITED STATES, PETITIONER,

vs.

ALFRED C. BERGH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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1 In the United States Court of Claims

No. 269-52

ALFRED C. BERGH, JOE FRANK BRYSON, JAMES A. CATES, HARRY J. NOVOTNEY, JR., GLENN VOCKRODT, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

PETITION—Filed May 28, 1952

To the Honorable, The Court of Claims:

1. At all times material hereto the plaintiffs were and now are citizens of the United States of America.

2. During all or part of the period from January 1, 1945, to December 1, 1945, the plaintiff, Alfred C. Bergh, was regularly employed as a leading-man, electric welder, in the Norfolk Navy Shipyard, Norfolk, Virginia; the plaintiff, Joe Frank Bryson, was regularly employed as a machinist in the Charleston Naval Shipyard, Naval Base, South Carolina; the plaintiff, James A. Cates, was regularly employed as a machinist in the Norfolk Naval Shipyard, Norfolk, Virginia; the plaintiff, Harry J. Novotney, Jr., was regularly employed as an electrician in the Puget Sound
2 Naval Shipyard, Puget Sound, Washington; and the plaintiff, Glenn Vockrodt, was regularly employed as an electrical trainee instructor in the Puget Sound Naval Shipyard, Puget Sound, Washington.

3. Plaintiffs, as civilian employees of the Naval Department, had their compensation fixed by the Wage Board of Review of the Navy Department in accordance with the provisions of the Act of July 16, 1862, 12 Stat. 587, 34 U.S.C. Section 505.

4. The plaintiff, Alfred C. Bergh, entered the military service of the United States on August 12, 1946, and was honorably discharged February 5, 1948. The plaintiff, Joe Frank Bryson, entered the military service of the United States on October 6, 1950, and was honorably discharged January 15, 1952. The plaintiff, James A. Cates, entered the military service of the United States on September 16, 1946, and was honorably discharged February 27, 1948. The plaintiff, Harry J. Novotney, Jr., entered the military service of the United States on November 8, 1945, and was honorably discharged on August 5, 1946. The plaintiff, Glenn Vockrodt, entered the military service of the United States on September 3, 1946, and was honorably discharged September 30, 1947.

5. In accordance with the Act of January 6, 1885, 23 Stat. 516, 5 U.S.C., Section 86, the Act of May 13, 1938, 52 Stat. 351, 5 U.S.C. Section 87(a), the Act of June 29, 1938, 52 Stat. 1246, 5 U.S.C., Section 86(a); and the Act of December 26, 1941, 55 Stat. 862, 5 U.S.C., Section 87(b), plaintiffs at all times material hereto were entitled to the following holidays with full pay when prevented or relieved from working solely because of the occurrence of these holidays: New Year's Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving Day, Christmas Day and Inauguration Day. In addition, plaintiffs were entitled to full pay whenever relieved or prevented from working on any
3 day declared a holiday by Federal Statute or Executive Order and on any day on which the Departments and establishments of the Government were closed by Executive Order.

6. During the period from January 1, 1945 to December 1, 1945, plaintiffs were regularly required to and did work on the following holidays, or some of them, all of which were holidays on which plaintiffs were entitled to be released from work with an ordinary day's pay in accordance with the statutes set forth in paragraph five of this petition:

January 1, 1945	New Year's Day
January 20, 1945	Inauguration Day
February 22, 1945	Washington's Birthday
May 30, 1945	Memorial Day
July 4, 1945	Fourth of July
September 3, 1945	Labor Day
November 11, 1945	Armistice Day
November 22, 1945	Thanksgiving Day

7. For work performed on the aforementioned holidays, plaintiffs received only the same rate of pay as for work performed on ordinary work days. They did not receive the additional compensation required by the statutes set out in paragraph five of this petition. Plaintiffs claim additional compensation in accordance with said statutes.

8. Each of the plaintiffs herein has submitted a claim for holiday compensation to the Comptroller General requesting that he be allowed additional compensation for having performed work on holidays during the period set out in this petition in accordance with the said statutory provisions.

9. In accordance with Release of February 11, 1952, Comptroller General of the United States, B-102974, B-102973, B-102897, in which the Comptroller General determined that claims based solely upon the statutes set out in paragraph five in the
4 instance where work was actually performed would be routinely denied, such denials have been issued or will be

issued to all of the plaintiffs herein. Plaintiffs state further upon information and belief that the great majority of such claims have been or are being denied routinely without the assignment of a Claim Number. Settlement Certificate, General Accounting Office, under date of March 28, 1952, without a Claim Number, denying his claim, was sent to the plaintiff, Alfred C. Bergh, a copy of which is attached hereto and made a part hereof as Exhibit No. 1. Other Settlement Certificates of a like nature have been or will be routinely sent to the other plaintiffs.

10. Each of the above-named plaintiffs claims and seeks judgment for $50.00 more or less representing compensation due him for work performed on holidays during the period set out in this petition. The amount of each claim will be subject to exact computation from the records of the Comptroller General prior to entry of judgments herein.

11. No other action has been taken on these claims in Congress or by any of the Departments; no persons other than the plaintiffs are interested therein; no assignments or transfers of these claims or any part thereof or interest therein have been made. The plaintiffs are justly entitled to the amounts as herein claimed from the United States after allowing all just credits and offsets.

5 *Wherefore*, each of the above-named plaintiffs prays judgment against the United States in the amount of $50.00 more or less subject to exact computation as aforesaid.

HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.
Attorney for Plaintiffs.

WOLL, GLENN & THATCHER
736 Bowen Building
Washington 5, D. C.
J. ALBERT WOLL
JAMES A. GLENN
JOSEPH E. FINLEY

Of Counsel

6 EXHIBIT NO. 1 TO PETITION

SETTLEMENT CERTIFICATE

General Accounting Office
Washington 25, D. C.

March 28, 1952

IN CORRESPONDENCE
PLEASE REFER TO:
DIVISION: CLAIMS
CLAIM NO.: ———

Mr. Alfred C. Bergh,
27 Gay Avenue
Portsmouth, Virginia.

Sir:

Your claim for additional compensation alleged to be due incident to services rendered on various holidays as an employee of the Department of the Navy has been carefully examined and it is found that no part thereof may be allowed for the reasons hereinafter stated.

The Supreme Court of the United States on January 2, 1952, U. S. Sup. Ct. No. 209, in affirming the decision of the United States Court of Claims in the case of *John Stuart Kelly, et al.* v. *United States*, decided April 3, 1951, 119 C. Cls. 197, 96 F. Supp. 611, predicated its finding that the petitioner was entitled to recover additional compensation for services rendered on certain holidays upon the basis of a "wage agreement" negotiated by the Public Printer and a committee of employees representing journeymen printers of the Government Printing Office the pertinent provisions of which agreement authorized payment of premium and gratuity pay for services rendered on legal holidays
7-8 and special holidays declared by Executive order.

The Department by which you were employed has reported that during the period of your claim there was no "agreement" in effect granting to employees of your class premium and gratuity pay for work performed on holidays.

I therefore certify that no balance is found due you from the United States.

Respectfully,

LINDSEY C. WARREN
Comptroller General
of the United States.
By: W. F. HAMET.

9 In the United States Court of Claims

[Title omitted]

DEFENDANT'S ANSWER—Filed Nov. 28, 1952

Defendant, for its answer to the petition filed herein:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits that plaintiffs, as civilian employees of the Navy Department, had their compensation fixed by the Navy Department in accordance with the provisions of the Act of July 16, 1862, 12 Stat. 587, 34 U.S.C. Section 505. The remaining allegations contained in paragraph 3 are denied.

10 4. Admits the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5 except the allegations that plaintiffs were entitled to full pay when prevented or relieved from working on Inauguration Day, which allegation is denied.

6. Admits that during the period from January 1, 1945, to December 1, 1945, plaintiffs were required to and did work on some of the days listed in paragraph 6. The remaining allegations of that paragraph are denied.

7. Admits that for work performed on the days listed in paragraph 6 of the petition the plaintiffs received the same rate of pay as for work performed on ordinary work days. The remaining allegations contained in paragraph 7 are denied.

8. Admits that plaintiffs Alfred C. Bergh, Harry J. Novotney, Jr., and Glenn Vockrodt submitted to the Comptroller General claims for additional compensation for having performed work on holidays during the period set forth in the petition. The remaining allegations contained in paragraph 8 are denied.

9. Admits that the claims of plaintiffs Alfred C. Bergh, Harry J. Novotney, Jr. and Glenn Vockrodt have been denied by the Comptroller General and that Exhibit No. 1 to the petition
11-12 is a true copy of the Settlement Certificate sent to plaintiff Alfred C. Bergh. The remaining allegations contained in paragraph 9 are denied.

10. Paragraph 10 of the petition, being a mere statement of claim, does not appear to require answer.

11. Denies knowledge or information sufficient to form a belief with respect to the allegations contained in paragraph 11, save the allegation that plaintiffs are entitled to recovery, which allegation is denied.

WHEREFORE, defendant prays that the petition be dismissed with costs assessed against plaintiffs.

HOLMES BALDRIDGE,
Assistant Attorney General.

GILBERT E. ANDREWS
Attorney for Defendant

13-35 In the United States Court of Claims

[Title omitted]

STIPULATION OF FACTS—Filed January 19, 1955

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the facts hereinafter set forth, shall be deemed to have been proved by competent evidence and shall constitute a part of the record in this case; provided that either party may object to any facts hereinafter stipulated and agreed to on the grounds of irrelevancy and immateriality; and provided further that either party may hereafter adduce material evidence in connection with the matters stipulated herein.

The basic questions of law and fact involved in this action appear to be common to all of the plaintiffs in this action. The facts hereinafter set forth are only those relevant to the claim of plaintiff Alfred C. Bergh. Upon the determination of the questions of law in the case of Bergh, the right of all other plaintiffs involving identical questions of law shall be thereby resolved. In the event of a decision that Bergh is entitled to recovery, the amount of his damages and of each of the other plaintiffs having identical claims shall be computed from the records of the Department of the Navy.

36 DEFENDANT'S EXHIBIT No. 1

COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON 25

B-53383 Nov. 29, 1945.

The Honorable,
The Secretary of War.

MY DEAR MR. SECRETARY:

There has been considered your letter of October 17, 1945, as follows:

> "Application of the Federal Employees Pay Act of 1945 to persons falling within its scope has created certain prob-

lems in this Department which are in need of solution at the earliest possible time. These problems arise primarily from the dual system of wage administration that exists in the Federal service. The Federal Employees Pay Act typifies this duality since, under present conditions, it is applicable to roughly fifty per cent of total Federal employment while the remaining groups are covered by a miscellany of other statutes and administrative practices. To a very great extent, the recent law extended to employees subject to the Classification Act of 1923, as amended, provisions very similar to those previously in effect for wage board employees with respect to pay and overtime computation, night differential payments, and regular hours of work.

"In connection with the observance of holidays, however, questions have been raised as to whether wage board employees who are required to work on such days may be compensated at the penalty rate of time and one-half. On the most recent occasion when this question arose, Labor Day of this year, the Department advised its field appointing officers that no authority existed for payment of other than straight time rates for work performance on that day, despite the fact that basic wages would have been payable under the act of June 29, 1938 (52 Stat. 1246), even if no work had been performed. The work so performed would therefore be without additional compensation, a situation which existed for all employees during
37 the war period. With passage of Section 302 of the Federal Employees Pay Act of 1945, however, continuance of that practice for wage board employees while paying penalty rates to the salaried group is highly discriminatory.

"Upon giving further thought to this question, however, we are inclined to believe that our original decision against payment of penalty rates for holiday work may have been in error insofar as legal authority is concerned. This view is based on the fact that there is no law currently in effect which treats the general subject of wage administration for employees not subject to the Classification Act of 1923, as amended, and that, in the absence of such statutory directive, it is incumbent upon the Department to provide appropriate administrative regulations. These regulations must, of course, be consistent with such statutes or Executive Orders as may exist for certain limited areas in this field but otherwise the Department is free to fill in the gaps. Before taking any steps to implement this conclusion, however, it is considered desirable to secure your concurrence both as to the general proposition and the immediate question of holiday pay.

"As you are well aware, the Congress has refrained from enacting any comprehensive wage system for positions falling in

the general category of trades, crafts and laboring occupations. Certain agencies of the Government, notably the Navy Department under the act of July 16, 1862 (12 Stat. 587), are under legislative mandate to fix hours of labor and rates of pay to conform as closely as the public interest will permit with those prevailing in private establishments in the immedate area of their installations. This Department is not now governed by a statute of this type but we have long recognized the desirability of adopting the 'prevailing rate' criterion as the core of our wage-fixing system. Since very early in the present century, determination of what constituted 'prevailing rates' has been a function of wage boards in our larger installations and of the chiefs of bureaus, arms, and services as an administrative duty for other stations. With the advent of the national wage stabilization policy under Executive Order No. 9250, October 3, 1942, it was necessary to create a central Wage Administration Agency in the Department to
38 exercise a central control over wage-fixing in field installations through approval of local survey findings. This agency developed a uniform wage policy for the Department which had as its basis compliance with statutes and War Labor Board rulings and adoption of progressive industrial wage practices. Under the latter category may be included the Agency's authorization of night differential payments in areas where that practice prevailed in competing industries. That element of the Department's wage program was recognized in your decision of July 20, 1944 (24 Comp. Gen. 39).

"It is emphasized that all of the above matters were purely administrative and that, in the absence of recognition for them, the Department could not have made payments over the many years that the practices have been followed. On two occasions the Congress has established mandatory standards to govern wage payments to employees not otherwise subject to statutory rates. Section 23 of the act approved March 28, 1934 (48 Stat. 509), placed a floor under their wage rates by providing that the weekly compensation set by wage boards or similar wage fixing authority should not be less than the full time weekly earnings under the wage schedules in effect on June 1, 1932. The same statute established a forty-hour week as the regular hours of labor for such employees and prescribed that penalty pay of *not less than* time and one-half should be paid for overtime work in excess of those hours. The act approved June 29, 1938 (52 Stat. 1246), established as public policy that daily, hourly, and piecework employees should be placed on a parity with annual salaried groups with respect to compensation for holidays on which no work is performed. Both of these statutes are directive in character, that is, they establish definite standards

within a limited area which the Department is required to meet. Neither they nor any other applicable statutes prohibit the Department from exceeding those standards so long as compensation is fixed uniformly for all employees similarly situated and actual services are rendered in connection with a purpose for which appropriations are made in compliance with Section 4 of the act approved August 5, 1882 (22 Stat. 255), as amended (see 5 U.S.C. 46).

"We are not unmindful of the decision rendered to this Department by Acting Comptroller Elliott in 18 Comp. Gen. 186 to the effect that only straight time rates were payable for holidays. However, it appears abundantly clear that circumstances have changed radically since that time and that the Department's adoption of a uniform wage system having as its aim the adoption of rates of pay, hours of work, and general conditions of employment which are in conformance with those of private industry requires and justifies reexamination of the statutes involved. With specific reference to the matter of holiday pay, for example, the general practice of private industry is evidenced by the fact that it was necessary to limit the number of holidays on which double time penalty pay might be authorized during the war period (see Executive Order No. 9240, recently revoked by Executive Order No. 9601). In addition, the Congress has now authorized penalty pay for holiday work performed by salaried Federal workers in a law which had as one of its avowed purposes equalization of pay and working conditions for all employees.

"It is believed that you will contribute greatly to sound wage administration in the Federal service generally by furnishing advice on the following general principle and its pertinent corollary:

"(a) As a basic maxim in fixing wages for those not subject to statutory schedules, is it required that Departments and agencies have specific statutory authority for each element of a wage program, such as overtime compensation, night differential payments, and holiday pay? It is to be understood, of course, that such provisions would not be inconsistent with existing statutes, orders, or decisions fixing definite minima or maxima in any specific area covered by statute and that general industrial practice would be used as a guide.

"(b) Would you be required to object to a change in existing regulations of this Department which would authorize payment of time and one-half the basic rate for work performed on a holiday? If penalty rates for such work are proper at all, may they exceed time and one-half as appears to be the general industrial practice."

39

Section 23 of the Independent Offices Appropriation Act,
40 1935, approved March 28, 1934, 48 Stat. 522, provides as follows:

> "Sec. 23. The weekly compensation, minus any general percentage reduction which may be prescribed by act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided*, That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one-half."

The said Section 23—generally referred to as the 40-hour week statute of 1934—expressly requires that the weekly compensation of employees coming within the purview thereof shall be reestablished and maintained "at rates not lower than necessary" to restore the full weekly earnings of such employees to their earnings under the wage schedules in effect on June 1, 1932; that the regular hours of labor "shall not be more than forty per week"; and that overtime shall be compensated for at a rate "not less than" time and one-half. While the functions of "wage boards or other wage-fixing authorities" mentioned in the said statute are to adjust, from time to time, the compensation of employees in the several trades and occupations to conform with the prevailing wage scale in effect for similar classes of employees in commercial industry, it is clear that with respect to the rates of regular compensation and overtime compensation the said Section 23 prescribes *minimum* requirements that must be met. That is to say, while, generally, the rates of regular and overtime compensation of employees of the Government within the purview of the said section are to be fixed in conformity with the rates in effect in commercial industry for similar employees, nevertheless, the minimum rates prescribed by Section 23 must be maintained even though the rates for similar employment in industry should be fixed at a lower level. Conversely, since
41 Section 23 fixes *minimum* rates, only, for regular and overtime compensation, it is evident that the rates of such compensation may be increased to accord with commercial standards. Likewise, it seems clear that wage boards or other wage-fixing authorities, in the exercise of their normal functions, may authorize night differential payments or other elements of a wage program—not otherwise in contravention of law or established rule applicable to Federal personnel—to conform with commercial practices generally, without first obtaining specific statutory authorization therefor. Sec. 24 Comp. Gen. 39; *id.* 676.

With respect to the authority of wage boards to authorize holiday pay for employees within the 40-hour week statute, that is, payment of "penalty rates" for work performed by such employees on holidays, it may be stated that the decisions of this office uniformly have held that, under the express provisions of the said Section 23, such employees, if required to work on a holiday falling within their regular tours of duty, are entitled to regular compensation, only, for that day. See 18 Comp. Gen. 186, 191, 673; 21 *id.* 217. That determination is based upon the specific provisions in Section 23 that the regular hours of labor shall not be more than forty per week and that "overtime" shall be compensated for at a rate not less than time and one-half. Stated in other words, since the said statute prescribes the "regular" hours of labor per week to be not more than forty, the settled construction thereof has been that a 40-hour week employee is not entitled to overtime compensation unless and until he shall have completed his regular tour of duty. The provision in the said statute that regular hours of labor per week shall not be more than forty consistently has been recognized as changing the hours of regular work of the employees affected thereby from a daily to a weekly basis with every day of the week —including Sundays and holidays—being regarded the same when within the regular tour of 40 hours. 13 Comp. Gen. 295, 444. Consequently, since, by its very terms, the 40-hour week statute
42 precludes payment of other than regular compensation for work performed by employees covered thereby on holidays falling within their regular tour of duty, it follows that, in the absence of specific statutory authority therefor, wage boards properly may not authorize the payment of "penalty rates" for work performed on such days.

It is realized that the provisions of Section 302 of the Federal Employees Pay Act of 1945, 59 Stat. 298, authorizing payment of compensation at the rate of one and one-half times the regular basic rate of compensation to employees covered by that *act* for work required on a holiday create an inequitable situation with respect to 40-hour week employees who, also, are required to work on holidays within their regular tour of duty. However, the fact that statutory authority now exists to pay per annum employees additional compensation for holiday work does not warrant the conclusion by this office that employees affected by the 40-hour week statute similarly should be so compensated. On the contrary, since prior to the enactment of the said Federal Employees Pay Act of 1945, per annum employees as well as 40-hour week employees were denied other than regular compensation for work on a holiday falling within their tours of duty, it would appear clear that before additional holiday pay may be paid the latter class of employees statutory authority therefor must be provided as was done in the case of per

annum employees. Of course, employees under the 40-hour week law who perform work on holidays falling outside their regular tour of duty and in excess of their regular hours of labor are entitled to overtime compensation at a rate not less than time and one-half as expressly provided by the said Section 23. Also, such 40-hour week employees who come within the purview of the holiday pay statute of June 29, 1938, 52 Stat. 1246, are entitled to payment of their regular compensation for Federal holidays and days on which the Government departments and establishments are closed by Executive order, if they are prevented from working on such days "solely because of the occurrence of a holiday."

43 In the light of the foregoing, question (a) is answered by saying that wage boards may alter the rates of regular compensation and overtime compensation for 40-hour week employees—not below the minimum rates prescribed by the 40-hour week statute—and may authorize night differential payments or other wage program changes, not specifically governed by statute, to accord with commercial practices regarding similar employees, without the necessity of first obtaining express statutory authority therefor, but that, in the absence of legislation to that effect, they properly may not authorize the payment of compensation for holiday work on any basis other than that prescribed by the said 40-hour week statute.

Assuming that question (b) has reference to work on a holiday falling within an employee's regular tour of duty, the question contained in the first sentence thereof is answered in the affirmative, rendering it unnecessary to answer the question presented in the last sentence.

Respectfully,

(Signed) FRANK L. YATES,
Acting Comptroller General of the United States.

44 ARGUMENT AND SUBMISSION OF CASE

On June 9, 1955, the case was argued and submitted on the merits by Mr. Herbert S. Thatcher for the plaintiffs, and by Mr. Walter Kiechel, Jr. for the defendant.

45 In the United States Court of Claims

No. 269-52

ALFRED C. BERGH, ET AL.

v.

THE UNITED STATES

Mr. Herbert S. Thatcher for the plaintiffs. *Mr. J. Albert Woll, Mr. James A. Glenn,* and *Mr. Joseph E. Finley* were on the briefs.

Mr. Walter Kiechel, Jr., with whom was *Mr. Assistant Attorney General Warren E. Burger,* for the defendant. *Mr. Gilbert E. Andrews,* and *Mr. Thomas Hogan* were on the briefs.

OPINION—July 12, 1955

LARAMORE, *Judge,* delivered the opinion of the court:

Alfred C. Bergh, one of the plaintiffs herein, is suing to recover extra pay which he alleges is due him for labor performed on certain legal holidays during the year 1945.[1]

At all times material herein, plaintiff Bergh was regularly employed as a leading man, electric welder, in the Norfolk Naval Shipyard, Portsmouth, Virginia, and as a per diem civilian employee of the Navy Department. During the year 1945, plaintiff Bergh worked on four holidays for which he was paid his regular per diem wage at straight time. For any work performed on those days in excess of eight hours he received overtime pay.

In furtherance of the prosecution of the war, on October 29, 1942, the Secretary of the Navy issued a directive providing for wartime holiday work by Navy employees. On August 17, 1943, in accordance with a directive of the President issued on May 12, 1943, the Secretary of the Navy issued a further directive which stated in pertinent part, as follows:

46 * * * necessity for maintaining maximum output in government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with exception of Christmas be considered as regular work days for the duration of the war * * *.

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[1] The case is presented upon a Stipulation of Facts. It has been agreed by counsel for plaintiffs and defendant that the decision of this court, based upon the Stipulation of Facts, will resolve the questions of law in the case of Bergh and four other plaintiffs similarly situated. The basic questions of law and fact are common to all of the plaintiffs in this action.

Plaintiff Bergh was subject to these directives. It was only to the extent of these directives that the plaintiff was required to work on four holidays during 1945. Plaintiff Bergh did not request the Department of the Navy to excuse him from work on these holidays.

On August 23, 1945, the normal observance of holidays (by the suspension of activities in the departments) was restored by White House memorandum. Accordingly, plaintiff Bergh did not work on three remaining holidays occurring in 1945. Nevertheless, he was paid his regular per diem wage on those days.

On March 10, 1952, Bergh submitted a claim to the Comptroller General of the United States for additional compensation for work performed on the four holidays occurring in 1945; namely, New Year's Day (January 1, 1945), Washington's Birthday (February 22, 1945), Memorial Day (May 30, 1945), and the Fourth of July (July 4, 1945). On March 28, 1952, the Comptroller General issued a Settlement Certificate in which he disallowed plaintiff Bergh's claim and certified that no balance was due him from the United States. Thereafter, plaintiff Bergh filed a petition in this court seeking a judgment against the United States for so-called "holiday gratuity pay."

The questions presented are: (1) whether the joint resolution of 1885 [2] established a mandatory benefit for Federal per diem employees and (2) if so, did the joint resolution of 1938 [3] operate to repeal the prior congressional enactment.

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[2] "The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the government, on duty in Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The 1st day of January, the 22nd day of February, the day of each year which is celebrated as "Memorial" or "Decoration Day," the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days" (No. 5, 23 Stat. 516, as amended by the Joint Resolution of February 23, 1887, No. 6, 24 Stat. 644, 5 U. S. C. § 86).

[3] "Whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day or any other day declared a holiday by Federal statute or Executive Order, or any other day on which the de-

47 We believe that the issue in this case was considered and disposed of by the majority opinion of this court in *Kelly* v. *United States*, 119 C. Cls. 197. In that case, one John Stuart Kelly, an hourly rated employee in the Government Printing Office, made the same claim for gratuity pay for holiday work as is being made by plaintiff Bergh, *i. e.*, a claim for an extra day's pay, in addition to his regular pay, for each holiday on which he was required to work and which fell on a regular work day. Kelly, however, predicated his claim not only on existing statutes and administrative practice, as does Bergh, but also, since he was an employee of the Government Printing Office, on certain provisions of the collective bargaining agreement in effect between the Government Printing Office and the Union representing the Government Printing Office employees. There is no such agreement covering Bergh's employment with the Navy Department, so Bergh makes no claim based on a contract theory.

The majority of this court upheld the Kelly claim, both on the theory of statutory right to gratuity pay and on the theory of contract right. The majority opinion specifically held in respect to the claim based on statutory right that the 1938 Resolution did not operate to repeal previously enacted statutory grants of gratuity pay but rather was designed (1) to give the same status, for gratuity pay purposes, to holidays established by Executive Order as to holidays established by statute, and (2) to eliminate a situation under which wage-rate employees, although not called to work, received gratuity pay on holidays which fell on a day, such as a Sunday, when the employee would not have worked in any event. The Government appealed the *Kelly* case to the United States Supreme Court, which Court on January 2, 1952,[4] affirmed, but did so solely on the ground that the collective agreement covering

48 Government Printing Office employees, by its express terms, required the payment of the gratuity pay claimed by Kelly. That Court expressed no opinion on the effect of the 1938 Joint Resolution as repealing prior enactments granting gratuity pay, although the Court did note that "the Resolution was silent on the subject of gratuity pay for holidays on which work was performed."

Defendant in its brief admits that the issue of compensation for

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partments and establishments of the Government are closed by Executive Order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

"Sec. 2. The Joint resolution of January 6, 1885, U. S. C., title 5, sec. 86, and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict" (c. 818, 52 Stat. 1246, 5 U. S. C. § 86a).

[4] *United States* v. *Kelly*, 342 U. S. 193.

loss of income occasioned by the closing of the establishment on a holiday was disposed of by the Joint Resolution of January 6, 1885, *supra*, as amended, but says the second problem, whether an employee required to work on a holiday should be granted additional compensation was not even considered. This brings us to the exact situation in the *Kelly* case, *supra*, wherein the court held that the Act of 1938 did not deny to the plaintiff his right to holiday pay in addition to the pay earned by him when he worked on holidays. To hold otherwise would lead to the conclusion that Congress by the 1938 Resolution intended to put the Government in an unfavorable position competitively at a time when the Government was in need of many new employees for the purpose of national defense. It would also lead to the absurd situation wherein if a per diem employee were required to work on a holiday, he would be paid no more than his fellow worker who was not required to work. Similarly, if a per diem employee were required to work two hours on a statutory holiday, he would be paid for only two hours of labor and would receive less pay than if he were not required to work at all.

As was said in *Kelly* v. *United States, supra* (P. 208):[5]

> One has immediate doubts as to whether Congress, in 1938, intended to take away from this class of Government employees these rights which they had enjoyed at least since 1895. And when one examines the origin and purpose of the legislation, he finds not the remotest intimation of any such intent. The resolution as originally introduced provided merely that per diem employees should be paid for the December 24, 1937, special holiday. It was amended so that it would serve as permanent legislation for all such occasions. The Civil Service Commission and the House Committee in enlarging the scope
> 49 of the resolution obviously had noted the Comptroller General's comment, quoted in the committee report, that the existing legislation had been so interpreted as to give employees pay for a holiday coming on a day when they would not have worked anyway. To prevent that unduly generous treatment, the language "whenever * * * employees * * * are relieved or prevented from working solely because of the occurrence of a holiday" was inserted. The words were apt for that purpose. Hence we are not asked by the plaintiffs to disregard, or nullify, words of a statute on the ground that Congress used them inadvertently. They had a purpose and were,

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[5] It was stipulated in the *Kelly* case that beginning with the Act of 1895 Government Printing Office employees were paid for these holidays whether the holidays fell on what would otherwise have been a work day or not.

for that purpose well chosen. We are asked only to hold that they should not be given an additional application, which, taken literally, they could receive, when all the indications are that they were not meant to have it.

* * * * *

This being the situation, we think that the administrative officers of the Government and the courts have no duty, and indeed no right, to attribute to Congress an intention which, it is morally certain, Congress did not have, by giving to words which Congress used for one obvious purpose, an additional application which, taken literally, they might support. The evil which Congress meant to cure by the words it used, it cured. The additional effect contended for by the Government would destroy a practice which no one had ever even intimated to be an evil, and which responsible officials had, for more than forty years regarded as just and necessary.

We can find no inconsistency between the 1885 Resolution and the 1938 Resolution. The 1938 Resolution says nothing on the subject of gratuity pay in situations where work was actually performed on a holiday. The 1885 Resolution has been consistently construed to grant gratuity pay in addition to regular pay for holiday worked and the 1938 Resolution only repealed the 1885 Resolution to the extent that it may be inconsistent.

Plaintiff has been paid for his holiday work. He is now asking only for the gratuity pay granted him under the 1885 Resolution.

All of the circumstances, including the legislative history of the 1938 Resolution, indicate that Congress did not intend to eliminate the customary practice of granting gratuity pay for days worked on holidays occurring on a regular work day. Furthermore, the 1938 Resolution can be given the construction contended for by plaintiffs herein without doing violence to its language or creating an
50 inconsistency with the 1885 Act.

The fact that during this period the Secretary of the Navy, in accordance with a directive of the President, issued a directive that holidays, with the exception of Christmas, be considered as regular work days, would have nothing to do with the issue here. If the Government required per diem employees to work on holidays, it should pay for such services.

Plaintiffs are entitled to recover. Judgment will be suspended pending a report from the General Accounting Office as to the exact amount due each plaintiff.

It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

WHITAKER, *Judge,* dissenting:

I dissent for the reasons stated in *Kelly et al.,* v. *United States,* 119 C. Cls. 197; aff'd. 342 U.S. 193.

FINDINGS OF FACT

The court makes findings of fact, based upon the stipulation of the parties, the briefs, and argument of counsel, as follows:

1. At all times material hereto, plaintiff Bergh has been and is now a citizen of the United States of America.

2. During the period from January 1, 1945, to December 1, 1945, Bergh was regularly employed as a leading man, electric welder, in the Norfolk Naval Shipyard, Portsmouth, Virginia, and, as a per diem civilian employee of the Navy Department, his rate of pay was fixed by the Secretary of the Navy in accordance with the provisions of the Act of July 16, 1862, 12 Stat. 587, 34 U. S. C. sec. 505.

3. During the period from January 1, 1945, to December 1, 1945, Bergh was required to and did work on each of the following holidays:

January 1, 1945	New Year's Day
February 22, 1945	Washington's Birthday
May 30, 1945	Memorial Day
July 4, 1945	Fourth of July

On each of these holidays, Bergh worked 9½ hours and was paid for the work performed on these holidays 8 hours' straight
51 time and 1½ hours' overtime. On January 1, 1945, Bergh worked the night shift and was paid at the basic rate of pay of $1.57 per hour. On February 22, 1945, May 30, 1945, and July 4, 1945, Bergh worked the day shift and was paid at the basic rate of $1.51 per hour.

4. During the period from January 1, 1945, to December 1, 1945, Bergh was excused from working but was nevertheless paid 8 hours' straight time for the following holidays:

September 3, 1945	Labor Day
November 12, 1945	Armistice Day (November 11, 1945, falling on a Sunday)
November 22, 1945	Thanksgiving Day

For each of these holidays on which Bergh performed no work, Bergh, who was at those times on the day shift, was paid 8 hours' straight time at the rate of pay of $1.51 per hour.

5. Bergh resigned from his employment in the Norfolk Naval Shipyard on August 13, 1946, at which time he entered the military services of the United States. He was honorably discharged from the military service on February 5, 1948, and was re-employed in the Norfolk Naval Shipyard on February 16, 1948.

6. On March 10, 1952, Bergh submitted a claim to the Comptroller General of the United States for additional compensation for the work performed on January 1, 1945, February 22, 1945, May 30, 1945, and July 4, 1945. On March 28, 1952, the Comptroller General issued a settlement certificate in which he disallowed Bergh's claim and certified that no balance was due him from the United States. A true copy of such settlement certificate is attached to the petition herein as Exhibit No. 1.

7. Prior to the enactment of the Joint Resolution of June 29, 1938 (52 Stat. 1246), the statutes relating to holiday pay for per diem employees generally were as follows:

> That the employes of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to-wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth
> 52 day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days (23 Stat. 516, Jan. 6, 1885).
>
> That all per diem employees of the Government on duty at Washington or elsewhere in the United States, shall be allowed the day of each year, which is celebrated as "Memorial" or "Declaration Day" and the fourth of July of each year, as holiday, and shall receive the same pay as on other days (24 Stat. 644, Feb. 23, 1887).
>
> That the first Monday of September of each year, being the day celebrated and known as Labor's Holiday, is hereby made a legal public holiday, to all intents and purposes, in the same manner as Christmas, the first day of January, the twenty-second day of February, the thirtieth day of May, and the fourth day of July are now made by public law holidays (28 Stat. 96, June 28, 1894).
>
> That the 11th day of November in each year, a day to be dedicated to the cause of world peace and to be hereafter celebrated and known as Armistice Day, is hereby made a legal public holiday to all intents and purposes and in the same manner as the 1st day of January, the 22d day of February, the 30th day of May, the 4th day of July, the first Monday of Sep-

tember, and Christmas Day are now made by law public holidays (52 Stat. 351, May 13, 1938).

8. The Joint Resolution of January 6, 1885, was initially construed by the Comptroller of the Treasury so as to deny an extra day's pay, at straight rates, called "gratuity" pay, to per diem employees who worked on a holiday. In a decision dated March 11, 1898 (4 Comp. Treas. 499), the following question from Major Dan C. Kingman, Corps of Engineers, was answered in the negative:

> (4) On all large works, it is frequently necessary to keep a certain number of per diem men at work on legal holidays to attend to the pumps, look after the steam machinery, take care of public animals, or for some unforeseen emergency work. In such cases would it be lawful and proper to allow these men an extra day's pay in order to put them on an equality with their fellows who do not work on the holiday and yet are paid full wages for it?

However, in a decision dated July 23, 1906, to the Secretary of the Navy, the Assistant Comptroller of the Treasury later
53 construed the above set forth Joint Resolution of January 6, 1885 (23 Stat. 516), to permit the payment of the regular per diem wage for work performed by first-class electrical machinist at the Naval Proving Grounds on a holiday, in addition to gratuity pay required by the Joint Resolution to be paid. In referring to said Joint Resolution of January 6, 1885 (23 Stat. 516), and the above set forth Joint Resolution of February 23, 1887 (24 Stat. 644), the opinion said:

> These statutes allow or grant to certain employees of the Government the holidays specified with regular pay. The pay given is not for service performed or labor performed, but is a gratuity. It is not intended that the employees shall perform any service for the pay given them by these joint resolutions. *The pay has no relation to work.* If the public interests require that these employes shall work on stated holidays and they do work, then if they receive only the pay given by the joint resolutions they have not been paid for their *labor*, but have received merely the gratuity which they were entitled to without working. They are, therefore, entitled to pay at the rate of their regular per diem pay for work on the holidays in addition to the gratuity pay given them by the statutes referred to; that is, to double the amount of their regular per diem pay when they work all day (13 Comp. Treas. 40).

On February 26, 1918, H. F. Wortham, Captain, Quartermaster Reserve Corps, requested an opinion of the Comptroller of the

Treasury as to whether per diem employees who worked on holidays should be paid gratuity pay plus time and one-half for the hours actually worked, as provided by an authorization of the Quartermaster General made with approval of the Secretary of War. In his reply of March 16, 1918 (24 Comp. Treas. 529) the Comptroller said:

> It has been held by this office that where, by reason of public necessity, per diem employees are required to perform services for the Government on any of the holidays specified in the Acts of Congress dated January 6, 1885 (23 Stat. 516); February 23, 1887 (24 Stat. 644); and June 28, 1894 (28 Stat. 96), they would be entitled, unless otherwise expressly provided, to double pay for such days, i.e., gratuity pay granted by Con-
> 54 gress and regular pay for services actually performed on said days. See 8 Comp. Dec. 322; 21 Comp. Dec. 571; 22 Comp. Dec. 405, and 24 Comp. Dec. 218.

On May 5, 1934, the Secretary of the Navy propounded a number of inquiries of the Comptroller General, some of which pertained to gratuity pay, and in this answer of May 19, 1934 (13 Comp. Gen. 370), the Comptroller General stated the opinion that gratuity pay in addition to the regular rate of pay should be given for work performed on any of the holidays mentioned in the Acts of January 6, 1885 (23 Stat. 516), February 23, 1887 (24 Stat. 644), and June 28, 1894 (28 Stat. 96).

9. Navy Regulations, 1896, Article 1574 (d) pertaining to pay of per diem workers provided:

> For work performed on Sundays or on legal holidays, the ordinary rate of pay, plus 50% additional shall be allowed.

Navy Regulations, 1900, Article 1574 (d) and Navy Regulations, 1905, Article 1600 (c) contain the same provisions quoted above. Navy Yard Order No. 853, dated August 16, 1910, stated, in part:

> * * * per diem employees paid from lump sum appropriation at Navy Yards, who are regularly required to work on Sundays and holidays, are entitled for work performed on national holidays to their regular rate of pay and in addition thereto gratuity pay.
>
> Laborers and mechanics who by reason of any emergency are required to work on national holidays are entitled to their regular rate of pay plus 50% additional, and in addition thereto to gratuity pay.

Navy Regulations and Naval Instructions, 1913, 382 (5) provided:

> For work performed on Sundays or on legal holidays by reason of an emergency, the ordinary rate of pay, with 50% additional, shall be allowed, and in addition thereto gratuity pay for the legal holidays.

Schedule of Wages for 1924, page 20, provided:

> For work on legal holidays not exceeding 8 hours performed under proper authority, the schedule rate of pay, plus
> 55 50% additional, shall be allowed, and, in addition thereto, gratuity pay for the legal holiday.
>
> For work in excess of 8 hours on Sundays or legal holidays performed by reason of extraordinary emergency, 50% additional to the Sunday or holiday rate of pay shall be allowed.

Schedule of Wages for 1925, page 20; Schedule of Wages for 1926, page 42; Schedule of Wages for 1927, page 43; Schedule of Wages for 1927, as amended, effective July 1, 1927, page 44; Schedule of Wages for 1928, page 41; Schedule of Wages for 1929, page 47; and Schedule of Wages revised to July 23, 1931, page 59, all contain the same provisions as that of the 1924 schedule quoted above.

Schedule of Wages revised to March 1, 1936, pages 55-56 provided:

> For work on legal holidays within the employee's regular tour of duty, the schedule rate of pay shall be allowed, and in addition thereto gratuity pay for the legal holiday.
>
> Gratuity pay shall be allowed for legal holidays not within the employee's regular tour of duty and upon which no work is performed.
>
> * * *
>
> For work on legal holidays, not exceeding 8 hours, when not a part of the employee's regular tour of duty, performed under proper authority, the schedule rate of pay, plus 50% additional, shall be allowed, and in addition thereto, gratuity pay for the legal holiday.
>
> For work in excess of the 8 hours on Sundays or legal holidays, when such days are not a part of the employee's regular tour of duty, performed by reason of an extraordinary emergency, 50% additional to the Sunday or holiday rate of pay, or 125% additional to the schedule rate of pay, shall be allowed.

10. Public Resolution No. 127 (52 Stat. 1246), enacted on June 29, 1938, provided as follows:

> That hereafter whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piecework basis are relieved or prevented from working *solely* because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the depart-
> 56 ments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.
>
> SEC. 2. The joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed *to the extent of such inconsistency or conflict.*

11. The Secretary of the Navy was informed by the Comptroller General, in decision of July 6, 1938, A-94536, 18 Comp. Gen. 10, that gratuity pay for holidays was no longer a vested right of per diem employees but that such employees were then entitled to pay for holidays only under and subject to the conditions of the Joint Resolution. The Comptroller General further held in decision of August 19, 1938, A-97193, 18 Comp. Gen. 188, as follows:

> Hence regular per diem, per hour and piecework employees are entitled to their regular pay for holidays on which no work is performed only if and when they are "relieved or prevented from working solely because of the occurrence of" the holiday. If they are relieved or prevented from working on the holiday for any reason other than the occurrence of a holiday such as when the holiday occurs on a non-workday or within a period of furlough or leave of absence, no pay for the holiday as such is authorized. If such employees are required to work on a holiday occurring within their regular tour of duty, only one day's pay is authorized—payment of gratuity holiday pay in addition being no longer authorized. If the holiday occurs on a day outside the regular tour of duty of 40 hours per week and work is required on the holiday, the employee is not entitled to 2 days' pay, one for working and one for the holiday, but may be entitled to overtime pay for the day under administrative regulations at a rate not less than one and one-half times their regular pay.

12. Navy Department Circular Letter of August 17, 1938, based on the 1938 resolution and the Comptroller General's opinion A-94536, deleted the provision of the Schedule of Wages revised to March 1, 1936, quoted in finding 9 hereof and substituted therefor:

> For work on any day declared a holiday by Federal statute or Executive Order or any day on which the departments
> 57 and establishments of the Government are closed by Executive Order, within the employee's regular tour of duty, the schedule rate of pay shall be allowed.
>
> Whenever an employee is relieved or prevented from working solely because of the occurrence of any day declared a holiday by Federal statute or Executive Order, or any day on which the departments and establishments of the Government are closed by Executive Order, he shall receive the same pay for such days as for other days on which an ordinary day's work is performed.
>
> For work on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are closed by Executive Order, not exceeding eight hours, when not a part of the employee's regular tour of duty, performed under proper authority, the schedule rate of pay plus 50% additional shall be allowed.
>
> For work in excess of eight hours on Sundays or on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are closed by Executive Order, when such days are not a part of the employee's regular tour of duty, performed by reason of extraordinary emergency, 50% additional to the Sunday or holiday rate of pay, or 125% additional to the schedule rate of pay shall be allowed.

Schedule of Wages, effective November 18, 1940, page 63; Schedule of Wages, revised to November 30, 1943, page 29; and Schedule of Wages, revised to October 16, 1944, pages 21-22, restated the provisions of the Circular Letter of August 17, 1938 quoted above, with some minor variations in wording.

Navy Civilian Personnel Instructions, NCPI 250.7-12 and 250.7-13 of April 13, 1945, continued the substantive provisions of the Circular Letter of August 17, 1938.

NCPI 250 Amendment 2 of September 20, 1945 substituted for provisions originated in the Circular Letter of August 17, 1938 quoted above, the following:

> a. Per diem employees shall be allowed compensation at the rate of true time and one-half for work on a Sunday

or holiday falling outside the regular tour of duty, provided they have been in a pay status during the regular 40-hour tour of duty.

b. For work on a Sunday or holiday falling within the
58 regular 40-hour tour of duty, per diem employees are allowed the same rate of pay as for any other day within the regular tour of duty.

13. In recognition of the construction of the Comptroller General of the Joint Resolution of June 29, 1938, there were introduced into Congress several bills to restore holiday gratuity pay rights similar or in addition to those conferred by prior statutes upon per diem employees. None of such bills was enacted into law. The first such bill was House Joint Resolution 303, 76th Cong., 1st Sess., which was introduced by Mr. Darden and referred to the Committee on Civil Service May 24, 1939 (84 Cong. Rec. 6111), and read as follows:

> That Public Resolution numbered 127, Seventy-fifth Congress approved June 29, 1938 entitled "Joint Resolution providing compensation for certain employees" be amended by striking out all after the resolving clause and substituting in lieu thereof the following:
>
> "That hereafter whenever employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are granted a holiday by Executive Order, or whenever the departments and establishments of the Government are closed by Executive Order in observance of a public event, they shall receive the same pay for such days as on other days on which an ordinary day's work is performed and all Acts or parts of Acts repealed or modified by the Act of June 29, 1938 (Public Resolution No. 127, 75th Cong.) are hereby restored to full force and effect."

On May 30, 1939, Robert Ramspeck, Chairman, Committee on Civil Service, House of Representatives, requested a report of the Civil Service Commission regarding the proposed legislation. On October 31, 1939, the president of the Civil Service Commission, Harry B. Mitchell, replied, stating that:

> It will be seen, therefore, that the Joint Resolution of June 29, 1938, thus interpreted [by the Comptroller General] instead of conferring the additional benefits of pay for days declared holidays by Executive Order, may operate to deprive a per diem employee of the gratuity pay for *statutory holidays*, a benefit which for more than fifty years has been

regarded as in the nature of a vested right. This interpretation of the statute grants no additional pay to a per diem employee who is required to work on a statutory holiday
59 occurring within his regular tour of duty, while a per diem employee with exactly the same tour of duty who is not required to work receives exactly the same pay for the holiday. Further, the receipt of pay for statutory holidays upon which per diem employees are not required to work is dependent upon circumstances which may be purely fortuitous, such as the occurrence of a holiday upon an administrative non-work day, or within a period of furlough or leave without pay. In other words, if two per diem employees performing exactly the same work are assigned to different tours of duty, one including a statutory holiday, and the other excluding it, the employee assigned to the former tour will receive pay for the holiday, whereas the employee assigned to the latter tour will not, although neither employee is required to work on that day. Since H. J. Res. 303 will adjust any inequalities as between per diem employees themselves, the Commission believes that favorable consideration should be given to the bill.

The Bureau of the Budget has advised this office that the enactment of H. J. Res. 303 in its present form would not be in accord with the program of the President. The Bureau states, however, that there would be no objection to the enactment of legislation which would permit the payment of compensation to a regular per diem employee when absent from duty for any cause on a holiday occurring within the tour of duty.

In the 77th Cong., 1st Sess., there was introduced H. R. 1386, a bill to grant all employees of the United States Government equal rights and privileges with respect to all established national holidays. H. R. 1386, introduced by Mr. Darden and referred to the Committee on Public Buildings and Grounds on January 6, 1941 (87 Cong. Rec. 47), reads as follows:

> That all employees of the United States Government whose tour of duty requires them to work on any national holiday for any reason whatsoever be not deprived of the benefits of any such holiday as to gratuity pay as may be established by Congress.
>
> SEC. 2. Where and whenever a holiday falls during any employees' tour of duty, such as employees of Government power plants, Fire Department employees, telephone operators, guards and other maintenance workers who may be required to work on holidays, that such employees be either

granted extra compensation over and above the gratuity pay allowed by congressional action for all national holidays
60 or that the employees be granted time out for such work on any holiday, and during the week in which a holiday falls.

SEC. 3. Compensation for holiday work shall be at one and one-half times the regular rate of pay and shall be in addition to the gratuity pay allowed for holiday. Where time out is granted for holiday work in lieu of compensation, such time shall likewise be granted on the same basis as the overtime rate of pay.

SEC. 4. After the passage of this Act, it shall be unlawful to work any employee of the United States Government in excess of thirty-two hours a week in which a national holiday falls, and for which said employee shall receive pay for forty hours' work; except that the stipulations of section 3 of this Act shall be complied with.

On January 14, 1941, Robert Ramspeck, Chairman, Committee on Civil Service, transmitted a copy of H. R. 1386 to the Civil Service Commission and requested a report of the Commission's views regarding the proposed legislation. On July 21, 1941, the Acting President, Lucille Foster McMillin, Civil Service Commission, replied, recommending certain changes and favorable consideration of the bill and stating further that the Bureau of the Budget had advised that the enactment of H. R. 1386, either in its present form, or in the amended form suggested by the Civil Service Commission, would not be in accord with the program of the President, but that there would be no objection to the enactment of legislation which would permit the payment of compensation to a regular per diem employee when absent from duty for any cause on a holiday occurring within his tour of duty.

There was introduced in the 77th Congress, 1st Session, S. 1930 (introduced September 24, 1941 by Senator Byrd and referred to the Senate Committee on Naval Affairs, 87 Cong. Rec. 7526) and H. R. 6222 (introduced December 15, 1941, by Mr. O'Toole and referred to the House Committee on Civil Service, 87 Cong. Rev. 9750). S. 1930 and H. R. 6222 both read as follows:

That the first section of the joint resolution entitled "Joint Resolution providing compensation for certain employees," approved June 29, 1938, is amended by inserting before the period at the end thereof a colon and the following:

"*Provided,* That whenever any employee of the Federal Government who is employed at any Navy yard or naval station is required to work on any such holiday or day

61 on which the departments and establishments of the Government are closed by Executive order, he shall be allowed compensatory time off on one other workday within the week following such holiday or, in lieu thereof, be paid one additional day's pay at his regular rate."

In the 79th Congress, 2d Sess., S. 1679, "A bill to authorize additional compensation for work performed on a legal holiday by employees of the Government Printing Office," was passed by the Senate on March 5, 1946 (92 Cong. Rec. 1919 and provided as follows:

> That employees of the Government Printing Office who are required to work on days designated by Federal statute or Executive order as holidays are entitled, for the time worked, to their regular rate of compensation in addition to the regular pay for the holiday.

S. 1679 was not passed by the House.

14. In the 77th Congress, 1st Session, there was introduced H. R. 1642, a proposed amendment to Public Resolution No. 127, to include per diem employees of the District of Columbia Government and to leave the substantive provisions of the Resolution unchanged. H. R. 1642 passed the House on June 2, 1941 (87 Cong. Rec. 4624) after the construction placed upon Public Resolution No. 127 by the Comptroller General had become well known and after other bills such as H. J. Res. 303, 76th Congress had been introduced to change the substantive effect of the Public Resolution as construed by the Comptroller General. H. R. 1642 was not passed by the Senate.

15. The Secretary of the Navy issued the following directives providing for wartime holiday work by Navy employees and disciplinary action against employees failing to report for work on holidays:

October 29 1942 ALNAVSTA 291330

Because of the necessity for expediting work due to war emergency 11 November Armistice Day X will be a work day for all employees of the Navy Department X Marine Corps and Coast Guard and their field services paragraph employees will receive their regular compensation for work performed
62 on Armistice Day X except that existing overtime provisions apply X per annum employees who are directed to report for work on the holiday and do not report for work on that day shall not be paid for the holiday X per diem employees who are directed to work on the holiday and do not report for work on that day shall be marked out and appropriate discipli-

nary cognizance taken of failure to report for duty paragraph in accordance decision Comp. Gen. 2 April no charge shall be made against the annual or sick leave accounts of per annum and per diem employees for absence on the holiday whether with or without authority.

August 17 1943 ALNAVSTA 172309

In accordance with a directive of the President 12 May that necessity for maintaining maximum output in government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should X with exception of Christmas be considered as regular work days for duration of war X Labor's holiday 6 September and all succeeding holidays X with exception of Christmas will be work days for all employees of the Navy Department X Headquarters US Marine Corps and Headquarters US Coast Guard and their field services X instructions regarding Armistice day in ALNAVSTA 291330 October 1942 apply.

16. On May 12, 1943, the following White House Memorandum was issued:

To the Heads of Executive Departments and Agencies
Subject: Observance of holidays during the war period

The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as
63 holidays should, with the exception of Christmas, be considered as regular work days for the duration of the war.

By direction of the President:

(S.) WM. H. MCREYNOLDS,

Administrative Assistant to the President.

This Presidential directive was reaffirmed on December 17, 1943, by Mr. W. H. McReynolds, Administrative Assistant to the President, in the following statement addressed to the heads of the Federal Departments and Agencies:

On May 13, 1943, by direction of the President, I issued the following statement concerning the observation of holidays:

"The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with exception of Christmas, be considered as regular work days for the duration of the war."

This policy is consistent with the attitude of the Government toward maintenance of full production in war industry on Holidays other than Christmas.

The President has reaffirmed his desire previously expressed on this matter.

There is full realization of the long hours which Federal employees are continuously working in the interest of the war effort and of the fact that holiday work is performed by Federal employees without additional compensation. The policy with respect to work on holidays will be reconsidered at the earliest possible moment that progress in the war will permit.

Christmas Day and Christmas Eve have traditionally been important family days in the life of this Nation. The President has indicated that the heads of departments and agencies may, in their discretion, permit offices or establishments to be closed or any employees whose services can be spared to leave their work not earlier than two hours in advance of the usual closing time on Christmas Eve, December 24.

With respect to forthcoming holidays, other than Christmas, you are advised that the President expects them to be observed as regular working days.

Accordingly, per annum and per diem employees of the United States were required to work on all succeeding holidays except Christmas until August 23, 1945, when the eight paid holidays were restored by White House Memorandum.

64 17. The Federal Employees Pay Act of 1945 (59 Stat. 295), effective July 1, 1945, authorized holiday premium pay at the rate of time and one-half "in lieu of their regular pay" when graded employees were required to work on a holiday. This law thus created an inequity between the two groups of employeees—graded and ungraded. With a view to correcting this inequity, the Secretary of the Navy and the Secretary of War in a joint letter to the Comptroller General asked whether the heads of the two departments by administrative order could authorize holiday premium pay for ungraded employees required to work on holidays. The Comptroller General ruled in the affirmative on February 7, 1946 (25 Comp. Gen. 584). By official order dated February 19, 1946 (Alnavsta No. 11), the Secretary of the Navy directed that all ungraded employees required to work on a holiday falling within the regular workweek be paid for such work at the rate of time and one-half in lieu of their regular rate. Bergh was an ungraded employee within the meaning of the Federal Employees Pay Act of 1945.

18. On September 9, 1942, the President, in Executive Order No.

9240, 7 F. R. 7159, limited the holiday pay of persons employed in war work, effective October 1, 1942, as follows:

Whereas many labor organizations have already adopted the patriotic policy of waiving double time wage compensation or other premium pay for work on Saturday, Sunday and holidays, as such, for the duration of the war; and

Whereas it is desirable and necessary in the prosecution of the war, and to insure uniformity and fair treatment for those labor organizations, employers and employees who are conforming to such wage policies that this principle be universally adopted.

Now, therefore, by virtue of the authority vested in me by the Constitution and the statutes, as President of the United States and as Commander in Chief of the Army and Navy, it is hereby ordered:

I. That the following principles and regulations shall apply for the duration of the war to the payment of premium and overtime wage compensation on all work relating to the prosecution of the war:

A. No premium wage or extra compensation shall be paid to any employee in the United States, its territories or possessions, for work on Saturday or Sunday except where
65 such work is performed by the employee on the sixth or seventh day worked in his regularly scheduled workweek and as hereinafter provided.

(1) Where because of emergency conditions an employee is required to work for seven consecutive days in any regularly scheduled workweek a premium wage of double time compensation shall be paid for work on the seventh day.

(2) Where required by the provisions of law or employment contracts, not more than time and one-half wage compensation shall be paid for work in excess of eight hours in any day or forty hours in any workweek or for work performed on the sixth day worked in any regularly scheduled workweek.

B. No premium wage or extra compensation shall be paid for work on customary holidays except that time and one-half wage compensation shall be paid for work performed on any of the following holidays only:

New Year's Day
Fourth of July
Labor Day
Thanksgiving Day
Christmas Day

and either Memorial Day or one other such holiday of greater local importance.

II. All Federal departments and agencies shall conform the provisions in all existing and future contracts negotiated, executed, or supervised by them to the policies of this order. All such departments and agencies shall immediately open negotiations to alter provisions in existing contracts to conform them to the requirements of this order.

III. Nothing in this order shall be construed as requiring a modification of the principle that every employee should have at least one day of rest in every seven days. The continuous operation of plants and machines in prosecuting the war does not require that employees should work seven consecutive days.

IV. Nothing herein shall be construed as superseding or in conflict with the provisions of the statutes prescribing the compensation, hours of work and other conditions of employment of employees of the United States.

V. All Federal departments and agencies affected by this order shall refer to the Secretary of Labor for determination questions of interpretation and application arising hereunder.

* * * * *

66 Interpretative Bulletin No. 1 of Executive Order 9240, U. S. Department of Labor, Office of the Secretary, dated February 17, 1943, contained the following provisions:

The Secretary of Labor, pursuant to Section V, is authorized and directed to interpret the provisions of Executive Order 9240. This bulletin is intended to set forth the Secretary's interpretations. The Order was designed (1) to facilitate 'round-the-clock war production, (2) to discourage absenteeism found to have resulted from the practice of paying premium rates for particular days as such, and (3) to assure, in the interest of efficiency and health, observance of the principle that workers should have at least one day of rest in each week. The interpretations embodied in this bulletin have been made after a number of months of experience under the Order and are believed to be in accord with its purpose.

* * * * *

II. COVERAGE

* * * * *

* * * Agricultural workers and *employees of Federal or State Government, and political subdivisions thereof, are not subject to the Order.*

* * * * *

VIII. Holidays

15. Paragraph I B of the Order has two requirements: (1) It requires time and one-half for work on the 6 holidays enumerated in the Order, and (2) it forbids payment of any premium wage or extra compensation for work on any other holidays as such. A choice is afforded between Memorial Day and any other holiday of greater local importance. Failure to select a substitute holiday leaves Memorial Day as the sixth holiday under the Order. The holiday chosen as a substitute for Memorial Day need not be the same holiday each year but only 6 holidays may be paid for at premium rates in the 12-month period beginning October first.

16. The Order requires that time and one-half compensation be paid for work on designated holidays but forbids payment in excess of time and one-half. Thus, if the wages of an employee include compensation for a holiday although not worked, the additional amount which must be paid under the Order for work performed on that holiday is limited to such amount
67 as brings the total compensation for the day to time and one-half.

17. Compensation for work performed on a holiday should be computed at one and one-half times the straight-time rate paid for work on that day or one and one-half times the average straight-time hourly rate for the workweek, whichever is the customary method of computing overtime compensation. The employer's records should indicate which method is adopted.

18. For purposes of computing the seventh day of work in a workweek under the Order, the designated holidays must be included in the count whether or not work is performed on such days. An idle holiday should be included in computing the sixth day worked in the workweek unless the employment contract specifies otherwise.

19. Insofar as the Order requires payment of time and one-half for work on the designated holidays, it means payment of time and one-half for the hours worked on the calendar holiday, namely, hours worked between midnight at the beginning of the holiday and midnight at the close of the holiday.

20. However, in order to give all employees equal benefit of the holiday, it is permissible to compensate employees at time and one-half for all hours worked on a shift, some part of which cuts across the calendar holiday. It is not permissible to pay the time and one-half holiday rate for more than one shift, in a situation in which the employee works two shifts, both of which cut across the calendar holiday. However, employees must be paid time and one-half for at least all the hours worked on the calendar holiday.

21. If one of the designated holidays falls on Sunday, either Sunday or Monday may be observed as the holiday, but not both.

22. There is no provision in the Order relating to compensation on holidays not worked.

* * * * *

Because its Zone Pay Standards were substantially identical to the provisions of Executive Order 9240 the shipbuilding and ship-repair industry was exempted from the terms of Executive Order 9240 (by order of Secretary of Labor, dated February 25, 1943). By these Zone Standards, employees of the shipbuilding and ship-repair industry were paid time and one-half for work performed on specified holidays during the period from July 19, 1952, to October 6, 1945.

68 19. The wage and working conditions of Bergh and a first-class electric welder employed by the largest privately owned shipyard in the Norfolk, Va., area, the Newport News Shipbuilding and Dry Dock Company, Newport News, Virginia, on January 1, 1945, were as follows:

Bergh (Navy):	Newport News Shipbuilding & Welder Dry Dock Co.:
1. Rate of pay:	
(a) Night shift, $1.57 per hour.	Unknown.
(b) Day shift, $1.51 per hour.	
(c) Holiday pay, same as above.	1½ regular rate on 6 specified holidays per year if worked.
2. Vacation: 26 days per year.	One week per year for employees with 2 years continuous service. Two weeks per year for employees with 10 years continuous service.
3. Sick leave: 15 days per year.	None.
4. Paid holidays: 8 days per year.	None.
5. Retirement: Civil Service.	Social Security.
6. Bonus plan: None.	None.
7. Hospitalization (in addition to on-the-job injury): None.	Employee-company participation.
8. Insurance (in addition to on-the-job injury): None.	Employee-company participation.

The holidays worked and pay received therefor by production employees of the Newport News Shipbuilding and Dry Dock Company during 1945 were as follows:

January 1, 1945, Holiday worked, pay and ½ received.
February 22, 1945, Holiday worked, straight pay received.

(George Washington's Birthday not a holiday specified in collective bargaining agreement or Zone Standards)

May 30, 1945, Holiday worked, pay and ½ received.
July 4, 1945, Holiday worked, pay and ½ received.
69-70 September 3, 1945, Holiday not worked, no pay received.
November 12, 1945, Holiday worked, straight pay received.

(Armistice Day not a holiday specified in collective bargaining agreement)

November 22, 1945, Holiday not worked, no pay received.
December 25, 1945, Holiday not worked, no pay received.

20. No other action has been taken on this claim in Congress or by any of the Departments; no person other than Bergh is the owner thereof or interested therein; no assignment or transfer of this claim or any part thereof, or interest therein has been made.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiffs are entitled to recover.

Entry of judgment is suspended pending the filing of a report by the General Accounting Office showing the amount due each plaintiff in accordance with this decision.

71-72 In the United States Court of Claims

No. 269-52

Alfred C. Bergh, et al.

v.

The United States

Order re Judgment—November 8, 1955

On July 12, 1955, the court rendered an opinion together with findings of fact holding that plaintiffs were entitled to recover but suspended the entry of judgment pending the filing of a report by

the General Accounting Office showing the amounts due each plaintiff.

On October 5, 1955, said report by the General Accounting Office was filed stating that there is due plaintiffs the amounts set forth below and further stating that as to plaintiff Harry J. Novotney, Jr. (4) there is no sum due.

NOW, THEREFORE, IT IS ORDERED this eighth day of November, 1955, that judgment be and the same hereby is entered for the following named plaintiffs and in the following amounts:

Alfred C. Bergh (1), forty-eight dollars and eighty cents ($48.80)

Joe Frank Bryson (2), thirty dollars and twenty-four cents ($30.24)

James A. Cates (3), fifty-one dollars and twenty cents ($51.20)

Glenn Vockrodt (5), twenty-one dollars and twenty-eight cents ($21.28).

IT IS FURTHER ORDERED that the petition as to plaintiff
73 Harry J. Novotney, Jr. (4) is dismissed.

BY THE COURT
(S) MARVIN JONES,
Chief Judge.

74 Clerk's Certificate to foregoing transcript omitted in printing.

75 SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 9th, 1955.

EARL WARREN,
Chief Justice of the United States.

Dated this 7th day of October, 1955.

76 SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 23, 1956

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 376828 1027

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

ALFRED C. BERGH, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on November 8, 1955.

OPINION BELOW

The opinion of the Court of Claims (R. 45–50; Appendix, *infra,* pp. 1–6) is reported at 132 F. Supp. 462.

JURISDICTION

The judgment of the Court of Claims was entered on November 8, 1955 (R. 71, Appendix, *infra,* p. 27). On October 7, 1955, by order of the Chief Justice (Appendix, *infra,* p. 28), the time for filing a petition for a writ of certiorari was

extended to and including December 9, 1955.[1] The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether Federal per diem employees who worked, and were duly paid for such work, on holidays designated for all Federal employees as regular work days during the war period are entitled to an extra day's pay for each of the holidays worked.

STATUTES INVOLVED

1. The Joint Resolution of June 29, 1938 (52 Stat. 1246, 5 U. S. C. 86a) provides:

> * * * whenever regular employees of the Federal Government whose compensation

[1] The opinion of the Court of Claims, entered on July 12, 1955, concludes with the statement "Judgment will be suspended pending a report from the General Accounting Office as to the exact amount due each plaintiff." (R. 50; Appendix, *infra*, p. 6.) In view of this wording, it is our view that time within which to petition for certiorari should not be computed from the date of the interim order but is to be measured by the date of entry of final judgment. See Memorandum For the United States in Response to Brief in Opposition filed in *United States of America* v. *Paul Tanner*, No. 280, this Term, pp. 3–10. However, since certiorari was denied in *Tanner* (on October 10, 1955) without indication as to whether that petition, filed within 90 days of the entry of judgment after accounting, was timely, petitioner, as a precautionary matter, is filing this petition within the proper time, as extended, from the date of the opinion below as well as within time from the date of final judgment.

is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

SEC. 2. The joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict.

2. The Joint Resolution of January 6, 1885 (23 Stat. 516), provided:

* * * the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanks-

giving, and shall receive the same pay as on other days.

STATEMENT

Respondents, formerly per diem employees of the Navy Department, brought suit in the Court of Claims to obtain an extra day's pay for each legal holiday on which they worked during the year 1945. Since each claim was based on similar facts and raised identical questions of law, the claim of respondent Bergh was selected as controlling, and the relevant facts, set forth below, were stipulated (R. 13).

On May 12, 1943, the President of the United States issued a Directive to the Heads of all Executive Departments and Agencies, which stated: "The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with the exception of Christmas, be considered as regular work days for the duration of the war" (R. 27–28). On December 17, 1943, this Directive was reaffirmed in a statement which said (R. 63):

* * * * *

> This policy is consistent with the attitude of the Government toward maintenance of full production in war industry on Holidays other than Christmas.
>
> The President has reaffirmed his desire previously expressed on this matter.

> There is full realization of the long hours which Federal employees are continuously working in the interest of the war effort and of the fact that holiday work is performed by Federal employees without additional compensation. The policy with respect to work on holidays will be reconsidered at the earliest possible moment that progress in the war will permit.
>
> Christmas Day and Christmas Eve have traditionally been important family days in the life of this Nation. The President has indicated that the heads of departments and agencies may, in their discretion, permit offices or establishments to be closed or any employees whose services can be spared to leave their work not earlier than two hours in advance of the usual closing time on Christmas Eve, December 24.
>
> With respect to forthcoming holidays, other than Christmas, you are advised that the President expects them to be observed as regular working days.

In accordance with this Directive, the Secretary of the Navy, on August 17, 1943, issued a directive requiring all employees of his Department to report for work on all holidays except Christmas for the duration of the war (R. 27). Pursuant to the Navy directive, Bergh, a per diem civilian employee of the Navy Department employed as a welder, was required to work on New Year's Day (January 1, 1945), Washing-

ton's Birthday (February 22, 1945), Memorial Day (May 30, 1945), and the Fourth of July (July 4, 1945). For each of these days, all of which are, in peacetime, legal holidays, Bergh was paid at his regular rate of pay. (R. 14.)

On March 10, 1952, Bergh submitted a claim to the Comptroller General of the United States requesting that he be allowed additional compensation equal to an extra day's pay for each day's work performed by him on the holidays listed above (R. 15). This claim was disallowed by the Comptroller General on March 28, 1952 (R. 15). Bergh then brought suit in the court below, seeking recovery of pay equal to the pay which he received on the listed holidays (R. 1–5).

The Court of Claims held that the 1938 Resolution (*supra,* pp. 2–3), which authorizes payment of holiday gratuity pay for those holidays on which an employee is prevented from working, did not "eliminate the customary practice of granting gratuity pay for days worked on holidays occurring on a regular work day" (R. 45, 49; Appendix, *infra,* p. 5). Judge Whitaker dissented.

REASONS FOR GRANTING THE WRIT

The Court of Claims has held that Government per diem employees are entitled to twice their regular rate of pay for holiday work performed by them during World War II when, pursuant to Presidential orders issued to achieve maximum wartime output, holidays generally were not ob-

served in the federal service and per annum employees received no additional compensation for working. The court below reached this conclusion by construing the 1938 Resolution (*supra*, pp. 2–3) so as to allow gratuity pay to per diem employees who did work on such holidays, even though the gratuity benefits of the Resolution are expressly limited to those employees who are *prevented* from working on holidays. We submit that this holding not only ignores the express language of the Resolution, but also disregards its plain purpose and consistent administrative interpretation. The question thus presented is the one left open in *United States* v. *Kelly*, 342 U. S. 193, a question broader in its reach than the contract issue on which that case was decided.[2] Because of the huge number of present and potential claims, the decision below, if allowed to stand, will impose an extremely heavy financial, litigation, and administrative burden upon the Government. In view of the importance of this decision and the substantial doubts as to its correctness, we submit that this Court should grant review.[3]

---

[2] In the cases for which this one is a test, there is no wage agreement like the one in *Kelly*, so that the effect of the 1938 Joint Resolution alone must be determined.

[3] Since the case at bar involves the unresolved question presented by the Government's petition for certiorari in the *Kelly* case (No. 209, October Term, 1951), we have here employed much of the material contained in that petition.

1. *The 1938 Resolution does not authorize gratuity pay for holidays on which an employee works and receives his regular pay.*—(a) *The express terms of the Resolution.*—The Resolution states clearly and unambiguously the condition under which holiday gratuity pay is authorized. It provides for such payment only where the employee is "relieved or prevented from working solely because of the occurrence of a holiday." *Supra,* p. 3. If the holiday prevents an employee from working, he gets gratuity pay; if it does not prevent him from working, and he is thus able to earn his regular pay, he is not entitled to an extra day's pay as gratuity pay. Since Bergh was not prevented or relieved from working on the holidays involved here, but, on the contrary, did work and get paid on those days, he is not entitled to gratuity pay.

(b) *The purpose of the Resolution.*—The purpose and background of the 1938 Resolution confirm the need for limiting gratuity pay to those holidays on which an employee does not work. As early as 1885, the preferential treatment then accorded per annum employees with respect to holiday pay was recognized by Congress.[4] Per annum employees

[4] There was earlier congressional recognition of this problem with reference to per diem employees of the Government Printing Office. In 1880, a resolution applicable only to per diem Printing Office employees was passed; its avowed purpose was to compensate those per diem employees who were prevented from working by the occurrence of a holiday for loss of income caused thereby. Joint Resolution of April 16, 1880, 21 Stat. 304.

whose salaries are traditionally regarded as payment for every calendar day in the year (whether work day or non-work day), have always received their regular pay each period, regardless of any holidays on which they are excused from working. Per diem and hourly employees, on the other hand, were not paid for holidays on which they did not work.

An 1885 Resolution eliminated this inequality and prevented holidays from reducing the amount of the regular pay checks for Federal per diem employees. The Resolution allowed specified employees certain designated legal holidays and provided that for all such holidays the employees "shall receive the same pay as on other days." Joint Resolution of January 6, 1885 (23 Stat. 516).

The purpose of this statute was to place per diem employees on a par with per annum employees with regard to holiday pay. But the overbroad language of the Resolution was interpreted so as to accord per diem employees preferential treatment over per annum employees in two major respects: First, per diem employees were allowed a day's gratuity pay even when a holiday on which they did not work fell on Saturday or Sunday (a non-work day) so that they received an extra day's pay in addition to the full week's pay otherwise earned. Second, if they worked on a holiday they received a day's gratuity pay in addition to

their regular rate of pay for that day. 13 Comp. Gen. 295, 297; 18 Comp. Gen. 186, 187. Per annum employees, holding comparable positions, received neither of these benefits.

This situation was brought before Congress in its consideration of H. J. Res. 551, 75th Congress, 3d sess., which became the 1938 Resolution. The sole original purpose of H. J. Res. 551 was to make per diem employees eligible for gratuity pay for certain additional holidays on which they did not work and on which regular employees were excused from work by Executive order. 83 Cong. Rec. 9466.[5] But a letter from the Acting Comptroller General to the Secretary of the Navy, reprinted in the report of the House Committee on the Civil Service, indicates that congressional attention also was drawn to the two preferential benefits accorded per diem employees in interpreting the early resolutions. The letter pointed out that

> * * * even when any of such holidays falls on a nonworkday (such as a Satur-

[5] The Comptroller General had ruled that per diem employees were entitled to holiday pay only for the holidays specified in the existing statutes (*e. g.*, the 1885 Resolution, *supra*, pp. 3–4), and could not receive such pay for additional holidays granted by the President (*e. g.*, December 24, 1937, established by Executive Order 7763 of December 6, 1937). H. J. Res. 551 was thereafter introduced, and provided, in its original form, only for the payment of compensation to employees who did not work on December 24, 1937. H. Rep. No. 2683, 75th Cong., 3d sess., p. 1.

> day), such employees [*i. e.*, per diem employees] receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned,

and that per diem employees received

> double compensation for the [holi]day if work is performed thereon. [H. Rep. No. 2683, 75th Cong., 3d sess., p. 5.]

The language of the Resolution as introduced did not eliminate this preferential treatment, but a substitute measure was adopted by the House Civil Service Committee. This substitute measure, enacted as the 1938 Resolution, wiped out both preferential benefits by allowing gratuity pay for a holiday only where the per diem employee was "relieved or prevented from working *solely*[*] because of the occurrence" of the holiday. *Supra*, p. 3. Thus, if the holiday on which the per diem employee did not work fell on a Sunday (a non-work day), he was not to receive any gratuity pay for that holiday because it was not the occurrence of the holiday which made Sunday a non-work day for him. Similarly, if he worked on the holiday, he was entitled to his regular rate of pay but not to any gratuity pay in addition, because the holiday did not prevent him from working. To make certain that preferential benefits would no longer be available to per diem employees, the 1938 Resolution expressly repealed the earlier

[*] Emphasis added.

1885 Resolution under which these benefits had been allowed by administrative interpretation. 52 Stat. 1247. By eliminating these preferential benefits, the 1938 Resolution carried out the intent of the 1885 Resolution in that it made plain that per diem employees were entitled to gratuity pay only when they did not work on a holiday.

(c) *Consistent administrative construction.*—The Comptroller General has consistently ruled that under the 1938 Resolution gratuity pay may not be permitted for those holidays on which an employee actually works. The earliest of these rulings was handed down within a few weeks after the 1938 Resolution took effect. 18 Comp. Gen. 10; 18 Comp. Gen. 186; 18 Comp. Gen. 191; 18 Comp. Gen. 206.[7]

Since that time, the General Accounting Office has consistently adhered to this natural interpretation of the 1938 Resolution. Such a consistent administrative construction is entitled to great

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[7] We respectfully note in this connection that this Court's footnote observation in *United States* v. *Kelly*, 342 U. S. at 196, footnote 6, repeated in the decision below (R. 48)—suggesting that the administrative construction leads to the absurd result of paying an employee less for working than for not working—does not actually accord with the construction employed in practice. Under the Government's view, an employee who works for part of a holiday—a day for which gratuity pay would be paid if he did not work at all—receives a full day's pay consisting of pay for the number of hours worked plus gratuity pay for the balance of the holiday. See 24 Comp. Gen. 843.

weight and "is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States* v. *Citizens Loan and Trust Co.*, 316 U. S. 209, 214; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517; *United States* v. *Jackson*, 280 U. S. 183, 193. Certainly, in view of the express language and purpose of the 1938 Resolution, there is at the very least a reasonable basis for the consistent construction accorded the Resolution by the Comptroller General. Since that construction was not clearly wrong, the court below erred in setting it aside.[8]

2. *The wartime policy of nonobservance of holidays supports denial of gratuity pay.*—In normal times there is ample justification for paying an em-

[8] The reason assigned by the court below for its refusal to credit the consistent administrative construction of the Resolution was that to do so "would lead to the conclusion that Congress by the 1938 Resolution intended to put the Government in an unfavorable position competitively at a time when the Government was in need of many new employees for the purpose of national defense." (R. 48; Appendix, *infra*, p. 4.) The error in the Court's reasoning becomes evident when it is recalled that in 1938 Congress found it necessary to appropriate $1,425,000,000 for the Works Progress Administration (52 Stat. 809) and $250,000,000 for Emergency Relief (52 Stat. 83) to alleviate the major national problem of unemployment. The same Congress which enacted the 1938 Resolution also enacted the Fair Labor Standards Act of 1938, 52 Stat. 1060, one of the purposes of which was to induce work-sharing and reduce unemployment by reducing hours of work. *Overnight Transportation Co.* v. *Missel*, 316 U. S. 572, 577. Furthermore, it should be observed that national defense efforts preceding this country's entrance into World War II were not under way in 1938.

ployee bonus or premium pay when he works on a holiday. Holiday work is more onerous and burdensome than work on a regular week day. A holiday is a day for religious, patriotic, or recreational pursuits. Assignment to holiday work involves on the part of the employee a departure from the normal way of living. These considerations justify payment of premium pay to those Federal employees who are required to work when other Federal employees are excused from work and allowed to enjoy an uninterrupted holiday without loss of pay.

The court below, however, completely overlooked the fact that during wartime none of these considerations is pertinent. Perhaps one of the least inconveniences in World War II was that suffered by civilian employees who had to give up their holidays so as to attain the maximum output needed for waging a successful war. The 1943 Presidential Directive, declaring the overriding wartime need, required all civilian Government employees to work on all holidays throughout the war with the exception of Christmas, *supra,* pp. 4–5. The normal peacetime holidays were thus converted into regular work days and employees generally were required to work on those days "without additional compensation" (Presidential Directive, December 17, 1943, *supra,* p. 5).

The policy of allowing gratuity pay for holiday work in peacetime (where such work is unusual) and of prohibiting it in wartime (when

holidays are regular work days) is reflected in the Federal Employees Pay Act of 1945. That Act, which became law after VE Day but before VJ Day, provided that its provision for premium pay for holiday work shall not take effect until "cessation of hostilities in the present war." 59 Stat. 298, Sec. 302, 5 U. S. C. 922. Postponement of the effective date of the premium pay provision was necessary because of the express congressional recognition of the policy that during World War II, "all holidays, except Christmas, are regular workdays." H. Rep. No. 726, 79th Cong., 1st sess., p. 13.[9] Since the holidays involved in the instant litigation were regular wartime work days, it is apparent that the decision below allowing gratuity pay conflicts with the well-established policy allowing such pay only for peacetime holidays. Cf. *DiBenedetto* v. *United States*, 108 C. Cls. 18, certiorari denied, 332 U. S. 763. In its decision, the court below has placed per diem employees in a superior status expresly denied to per annum employees by consistent legislative and administrative policy.

3. *The question, left open in United States* v. *Kelly*, 342 U. S. 193, *is of substantial importance.* The question on which certiorari was granted in the *Kelly* case was whether the 1938 Resolution permitted gratuity pay in addition to pay for

[9] This report accompanied H. R. 3393, which became the Federal Employees Pay Act of 1945.

work on holidays where a wage agreement covering the employees involved provided that, for working on a holiday, the employees should "be paid at the day rate plus 50 per cent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law * * * ." Holding only that the wage agreement required an affirmative answer, this Court stated that the Resolution "was silent on the subject of gratuity pay for holidays on which work was performed, *and we may even assume that it did not provide gratuity pay for those days.*" 342 U. S. at 195 (emphasis added).[10] The Court there held that the problem was "whether the Resolution somehow precludes the awarding of the gratuity pay which the agreement seems to grant." *Id.* at 194. Here, on the other hand, the question is not whether the Resolution *precludes* such pay where an agreement may award it, but whether, in the absence of any agreement, the Resolution *authorizes* such pay. Thus, the *Kelly* case, far from being dispositive of the issue here, helps to demonstrate the propriety of review in this case.

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[10] Chief Justice Vinson and Justices Reed and Black, dissenting, were of the the opinion that the Resolution allows gratuity pay only where a holiday prevents employees from working, and that, therefore, a wage agreement calling for gratuity pay "as provided by law" could not be construed to grant employees such pay where they were not prevented from working by the occurrence of a holiday. 342 U. S. at 197.

For the broader issue undecided in *Kelly* remains one of widespread significance. The General Accounting Office has advised that, as a result of the decision below, upwards of 70,000 claims for extra pay for holidays worked have already been received. While it has not been possible to secure a complete estimate of the number of potential claimants, there is a strong possibility that full liability on the part of the United States would amount to three-quarters of a billion dollars. And it is to be noted in this connection that the statute of limitations for claims before the General Accounting Office is ten years. 31 U. S. C. 71a.[11]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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DECEMBER 1955.

[11] A bill (H. R. 7597) has been introduced in the House of Representatives to waive the ten-year statutes of limitations applicable to claims before the General Accounting Office (31 U. S. C. 71a) for the benefit of those former employees who did not timely file their claims.

In the United States Court of Claims

No. 269–52

(Decided July 12, 1955)

ALFRED C. BERGH, ET AL. v. THE UNITED STATES

Mr. Herbert S. Thatcher for the plaintiffs. *Mr. J. Albert Woll*, *Mr. James A. Glenn*, and *Mr. Joseph E. Finley* were on the briefs.

Mr. Walter Kiechel, Jr., with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant. *Mr. Gilbert E. Andrews*, and *Mr. Thomas Hogan* were on the briefs.

OPINION

LARAMORE, *Judge*, delivered the opinion of the court:

Alfred C. Bergh, one of the plaintiffs herein, is suing to recover extra pay which he alleges is due him for labor performed on certain legal holidays during the year 1945.[1]

At all times material herein, plaintiff Bergh was regularly employed as a leading man, electric welder, in the Norfolk Naval Shipyard, Portsmouth, Virginia, and, as a per diem civilian employee of the Navy Department. During the year 1945, plaintiff Bergh worked on four holidays for which he was paid his regular per diem wage at straight time. For any work performed on those days in excess of eight hours he received overtime pay.

In furtherance of the prosecution of the war, on October 29, 1942, the Secretary of the Navy issued a directive providing for wartime holiday work by Navy employees. On August 17, 1943, in accordance with a directive of the President issued on May 12, 1943, the Secretary of the Navy issued a further directive which stated in pertinent part, as follows:

[1] The case is presented upon a Stipulation of Facts. It has been agreed by counsel for plaintiffs and defendant that the decision of this court, based upon the Stipulation of Facts, will resolve the questions of law in the case of Bergh and four other plaintiffs similarly situated. The basic questions of law and fact are common to all of the plaintiffs in this action.

> * * * necessity for maintaining maximum output in government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with exception of Christmas be considered as regular work days for the duration of the war * * *.

Plaintiff Bergh was subject to these directives. It was only to the extent of these directives that the plaintiff was required to work on four holidays during 1945. Plaintiff Bergh did not request the Department of the Navy to excuse him from work on these holidays.

On August 23, 1945, the normal observance of holidays (by the suspension of activities in the departments) was restored by White House memorandum. Accordingly, plaintiff Bergh did not work on three remaining holidays occurring in 1945. Nevertheless, he was paid his regular per diem wage on those days.

On March 10, 1952, Bergh submitted a claim to the Comptroller General of the United States for additional compensation for work performed on the four holidays occurring in 1945; namely, New Year's Day (January 1, 1945), Washington's Birthday (February 22, 1945), Memorial Day (May 30, 1945), and the Fourth of July (July 4, 1945). On March 28, 1952, the Comptroller General issued a Settlement Certificate in which he disallowed plaintiff Bergh's claim and certified that no balance was due him from the United States. Thereafter, plaintiff Bergh filed a petition in this court seeking a judgment against the United States for so-called "holiday gratuity pay."

The questions presented are: (1) whether the joint resolution of 1885 [2] established a mandatory benefit for Federal per diem employees and (2) if so, did the joint resolution of 1938 [3] operate to repeal the prior congressional enactment.

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[2] "The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the government, on duty in Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The 1st day of January, the 22nd day of February, the day of each year which is celebrated as "Memorial" or "Decoration Day," the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days" (No. 5, 23 Stat. 516, as amended by the Joint Resolution of February 23, 1887, No. 6, 24 Stat. 644, 5 U. S. C. § 86).

[3] "Whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as

We believe that the issue in this case was considered and disposed of by the majority opinion of this court in *Kelly* v. *United States*, 119 C. Cls. 197. In that case, one John Stuart Kelly, an hourly rated employee in the Government Printing Office, made the same claim for gratuity pay for holiday work as is being made by plaintiff Bergh, *i. e.*, a claim for an extra day's pay, in addition to his regular pay, for each holiday on which he was required to work and which fell on a regular work day. Kelly, however, predicated his claim not only on existing statutes and administrative practice, as does Bergh, but also, since he was an employee of the Government Printing Office, on certain provisions of the collective bargaining agreement in effect between the Government Printing Office and the Union representing the Government Printing Office employees. There is no such agreement covering Bergh's employment with the Navy Department, so Bergh makes no claim based on a contract theory.

The majority of this court upheld the Kelly claim, both on the theory of statutory right to gratuity pay and on the theory of contract right. The majority opinion specifically held in respect to the claim based on statutory right that the 1938 Resolution did not operate to repeal previously enacted statutory grants of gratuity pay but rather was designed (1) to give the same status, for gratuity pay purposes, to holidays established by Executive Order as to holidays established by statute, and (2) to eliminate a situation under which wage-rate employees, although not called to work, received gratuity pay on holidays which fell on a day, such as a Sunday, when the employee would not have worked in any event. The Government appealed the *Kelly* case to the United States Supreme Court, which Court on January 2, 1952,[4] affirmed, but did so solely on the ground that the collective agreement covering Government Printing Office em-

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New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day or any other day declared a holiday by Federal statute or Executive Order, or any other day on which the departments and establishments of the Government are closed by Executive Order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

"Sec. 2. The Joint resolution of January 6, 1885, U. S. C., title 5, sec. 86, and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict" (c. 818, 52 Stat. 1246, 5 U. S. C. § 86a).

[4] *United States* v. *Kelly*, 342 U. S. 193.

ployees, by its express terms, required the payment of the gratuity pay claimed by Kelly. That Court expressed no opinion on the effect of the 1938 Joint Resolution as repealing prior enactments granting gratuity pay, although the Court did note that "the Resolution was silent on the subject of gratuity pay for holidays on which work was performed."

Defendant in its brief admits that the issue of compensation for loss of income occasioned by the closing of the establishment on a holiday was disposed of by the Joint Resolution of January 6, 1885, *supra*, as amended, but says the second problem, whether an employee required to work on a holiday should be granted additional compensation was not even considered. This brings us to the exact situation in the *Kelly* case, *supra*, wherein the court held that the Act of 1938 did not deny to the plaintiff his right to holiday pay in addition to the pay earned by him when he worked on holidays. To hold otherwise would lead to the conclusion that Congress by the 1938 Resolution intended to put the Government in an unfavorable position competitively at a time when the Government was in need of many new employees for the purpose of national defense. It would also lead to the absurd situation wherein if a per diem employee were required to work on a holiday, he would be paid no more than his fellow worker who was not required to work. Similarly, if a per diem employee were required to work two hours on a statutory holiday, he would be paid for only two hours of labor and would receive less pay than if he were not required to work at all.

As was said in *Kelly* v. *United States*, *supra* (P. 208):[5]

> One has immediate doubts as to whether Congress, in 1938, intended to take away from this class of Government employees these rights which they had enjoyed at least since 1895. And when one examines the origin and purpose of the legislation, he finds not the remotest intimation of any such intent. The resolution as originally introduced provided merely that per diem employees should be paid for the December 24, 1937, special holiday. It was amended so that it would serve as permanent legislation for all such occasions. The Civil Service Commission and the House Committee in enlarging the scope of the resolution obviously had

[5] It was stipulated in the *Kelly* case that beginning with the Act of 1895 Government Printing Office employees were paid for these holidays whether the holidays fell on what would otherwise have been a work day or not.

noted the Comptroller General's comment, quoted in the committee report, that the existing legislation had been so interpreted as to give employees pay for a holiday coming on a day when they would not have worked anyway. To prevent that unduly generous treatment, the language "whenever * * * employees * * * are relieved or prevented from working solely because of the occurrence of a holiday" was inserted. The words were apt for that purpose. Hence we are not asked by the plaintiffs to disregard, or nullify, words of a statute on the ground that Congress used them inadvertently. They had a purpose and were, for that purpose well chosen. We are asked only to hold that they should not be given an additional application, which, taken literally, they could receive, when all the indications are that they were not meant to have it.

* * * * *

This being the situation, we think that the administrative officers of the Government and the courts have no duty, and indeed no right, to attribute to Congress an intention which, it is morally certain, Congress did not have, by giving to words which Congress used for one obvious purpose, an additional application which, taken literally, they might support. The evil which Congress meant to cure by the words it used, it cured. The additional effect contended for by the Government would destroy a practice which no one had ever even intimated to be an evil, and which responsible officials had, for more than forty years regarded as just and necessary.

We can find no inconsistency between the 1885 Resolution and the 1938 Resolution. The 1938 Resolution says nothing on the subject of gratuity pay in situations where work was actually performed on a holiday. The 1885 Resolution has been consistently construed to grant gratuity pay in addition to regular pay for holidays worked and the 1938 Resolution only repealed the 1885 Resolution to the extent that it may be inconsistent.

Plaintiff has been paid for his holiday work. He is now asking only for the gratuity pay granted him under the 1885 Resolution.

All of the circumstances, including the legislative history of the 1938 Resolution, indicate that Congress did not intend to eliminate the customary practice of granting gratuity pay for days worked on holidays occurring on a regular work day. Furthermore, the 1938 Resolution can be given the construction contended for by plaintiffs herein without doing

violence to its language or creating an inconsistency with the 1885 Act.

The fact that during this period the Secretary of the Navy, in accordance with a directive of the President, issued a directive that holidays, with the exception of Christmas, be considered as regular work days, would have nothing to do with the issue here. If the Government required per diem employees to work on holidays, it should pay for such services.

Plaintiffs are entitled to recover. Judgment will be suspended pending a report from the General Accounting Office as to the exact amount due each plaintiff.

It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

WHITAKER, *Judge*, dissenting:

I dissent for the reasons stated in *Kelly et al.*, v. *United States*, 119 C. Cls. 197; aff'd. 342 U. S. 193.

FINDINGS OF FACT

The court makes findings of fact, based upon the stipulation of the parties, the briefs, and argument of counsel, as follows:

1. At all times material hereto, plaintiff Bergh has been and is now a citizen of the United States of America.

2. During the period from January 1, 1945, to December 1, 1945, Bergh was regularly employed as a leading man, electric welder, in the Norfolk Naval Shipyard, Portsmouth, Virginia and, as a per diem civilian employee of the Navy Department, his rate of pay was fixed by the Secretary of the Navy in accordance with the provisions of the Act of July 16, 1862, 12 Stat. 587, 34 U. S. C. sec. 505.

3. During the period from January 1, 1945, to December 1, 1945, Bergh was required to and did work on each of the following holidays:

January 1, 1945	New Year's Day
February 22, 1945	Washington's Birthday
May 30, 1945	Memorial Day
July 4, 1945	Fourth of July

On each of these holidays, Bergh worked 9½ hours and was paid for the work performed on these holidays 8 hours'

straight time and 1½ hours' overtime. On January 1, 1945, Bergh worked the night shift and was paid at the basic rate of pay of $1.57 per hour. On February 22, 1945, May 30, 1945, and July 4, 1945, Bergh worked the day shift and was paid at the basic rate of $1.51 per hour.

4. During the period from January 1, 1945, to December 1, 1945, Bergh was excused from working but was nevertheless paid 8 hours' straight time for the following holidays:

September 3, 1945	Labor Day
November 12, 1945	Armistice Day (November 11, 1945, falling on a Sunday)
November 22, 1945	Thanksgiving Day

For each of these holidays on which Bergh performed no work, Bergh, who was at those times on the day shift, was paid 8 hours' straight time at the rate of pay of $1.51 per hour.

5. Bergh resigned from his employment in the Norfolk Naval Shipyard on August 13, 1946, at which time he entered the military service of the United States. He was honorably discharged from the military service on February 5, 1948, and was re-employed in the Norfolk Naval Shipyard on February 16, 1948.

6. On March 10, 1952, Bergh submitted a claim to the Comptroller General of the United States for additional compensation for the work performed on January 1, 1945, February 22, 1945, May 30, 1945, and July 4, 1945. On March 28, 1952, the Comptroller General issued a settlement certificate in which he disallowed Bergh's claim and certified that no balance was due him from the United States. A true copy of such settlement certificate is attached to the petition herein as Exhibit No. 1.

7. Prior to the enactment of the Joint Resolution of June 29, 1938 (52 Stat. 1246), the statutes relating to holiday pay for per diem employees generally were as follows:

> That the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the

fourth day of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days (23 Stat. 516, Jan. 6, 1885).

That all per diem employees of the Government on duty at Washington or elsewhere in the United States, shall be allowed the day of each year, which is celebrated as "Memorial" or "Declaration Day" and the fourth of July of each year, as holiday, and shall receive the same pay as on other days (24 Stat. 644, Feb. 23, 1887).

That the first Monday of September of each year, being the day celebrated and known as Labor's Holiday, is hereby made a legal public holiday, to all intents and purposes, in the same manner as Christmas, the first day of January, the twenty-second day of February, the thirtieth day of May, and the fourth day of July are now made by law public holidays (28 Stat. 96, June 28, 1894).

That the 11th day of November in each year, a day to be dedicated to the cause of world peace and to be hereafter celebrated and known as Armistice Day, is hereby made a legal public holiday to all intents and purposes and in the same manner as the 1st day of January, the 22d day of February, the 30th day of May, the 4th day of July, the first Monday of September, and Christmas Day are now made by law public holidays (52 Stat. 351, May 13, 1938).

8. The Joint Resolution of January 6, 1885, was initially construed by the Comptroller of the Treasury so as to deny an extra day's pay, at straight rates, called "gratuity" pay, to per diem employees who worked on a holiday. In a decision dated March 11, 1898 (4 Comp. Treas. 499), the following question from Major Dan C. Kingman, Corps of Engineers, was answered in the negative:

> (4) On all large works, it is frequently necessary to keep a certain number of per diem men at work on legal holidays to attend to the pumps, look after the steam machinery, take care of public animals, or for some unforeseen emergency work. In such cases would it be lawful and proper to allow these men an extra day's pay in order to put them on an equality with their fellows who do not work on the holiday and yet are paid full wages for it?

However, in a decision dated July 23, 1906, to the Secretary of the Navy, the Assistant Comptroller of the Treasury

later construed the above set forth Joint Resolution of January 6, 1885 (23 Stat. 516), to permit the payment of the regular per diem wage for work performed by first-class electrical machinist at the Naval Proving Grounds on a holiday, in addition to gratuity pay required by the Joint Resolution to be paid. In referring to said Joint Resolution of January 6, 1885 (23 Stat. 516), and the above set forth Joint Resolution of February 23, 1887 (24 Stat. 644), the opinion said:

> These statutes allow or grant to certain employees of the Government the holidays specified with regular pay. The pay given is not for service performed or labor performed, but is a gratuity. It is not intended that the employees shall perform any service for the pay given them by these joint resolutions. *The pay has no relation to work.* If the public interests require that these employees shall work on the stated holidays and they do work, then if they receive only the pay given by the joint resolutions they have not been paid for their *labor*, but have received merely the gratuity which they were entitled to without working. They are, therefore, entitled to pay at the rate of their regular per diem pay for work on the holidays in addition to the gratuity pay given them by the statutes referred to; that is, to double the amount of their regular per diem pay when they work all day (13 Comp Treas. 40).

On February 26, 1918, H. F. Wortham, Captain, Quartermaster Reserve Corps, requested an opinion of the Comptroller of the Treasury as to whether per diem employees who worked on holidays should be paid gratuity pay plus time and one-half for the hours actually worked, as provided by an authorization of the Quartermaster General made with approval of the Secretary of War. In his reply of March 16, 1918 (24 Comp. Treas. 529) the Comptroller said:

> It has been held by this office that where, by reason of public necessity, per diem employees are required to perform services for the Government on any of the holidays specified in the Acts of Congress dated January 6, 1885 (23 Stat. 516); February 23, 1887 (24 Stat. 644); and June 28, 1894 (28 Stat. 96), they would be entitled, unless otherwise expressly provided, to double pay for such days, i. e., gratuity pay granted by Con-

gress and regular pay for services actually performed on said days. See 8 Comp. Dec. 322; 21 Comp. Dec. 571; 22 Comp. Dec. 405, and 24 Comp. Dec. 218.

On May 5, 1934, the Secretary of the Navy propounded a number of inquiries of the Comptroller General, some of which pertained to gratuity pay, and in this answer of May 19, 1934 (13 Comp. Gen. 370), the Comptroller General stated the opinion that gratuity pay in addition to the regular rate of pay should be given for work performed on any of the holidays mentioned in the Acts of January 6, 1885 (23 Stat. 516), February 23, 1887 (24 Stat. 644), and June 28, 1894 (28 Stat. 96).

9. Navy Regulations, 1896, Article 1574 (d) pertaining to pay of per diem workers provided:

> For work performed on Sundays or on legal holidays, the ordinary rate of pay, plus 50% additional shall be allowed.

Navy Regulations, 1900, Article 1574 (d) and Navy Regulations, 1905, Article 1600 (c) contain the same provisions quoted above.

Navy Yard Order No. 853, dated August 16, 1910, stated, in part:

> * * * per diem employees paid from lump sum appropriation at Navy Yards, who are regularly required to work on Sundays and holidays, are entitled for work performed on national holidays to their regular rate of pay and in addition thereto gratuity pay.
>
> Laborers and mechanics who by reason of any emergency are required to work on national holidays are entitled to their regular rate of pay plus 50% additional, and in addition thereto to gratuity pay.

Navy Regulations and Naval Instructions, 1913, 382 (5) provided:

> For work performed on Sundays or on legal holidays by reason of an emergency, the ordinary rate of pay, with 50% additional, shall be allowed, and in addition thereto gratuity pay for the legal holidays.

Schedule of Wages for 1924, page 20, provided:

> For work on legal holidays not exceeding 8 hours performed under proper authority, the schedule rate of pay,

plus 50% additional, shall be allowed, and, in addition thereto, gratuity pay for the legal holiday.

For work in excess of 8 hours on Sundays or legal holidays performed by reason of extraordinary emergency, 50% additional to the Sunday or holiday rate of pay shall be allowed.

Schedule of Wages for 1925, page 20; Schedule of Wages for 1926, page 42; Schedule of Wages for 1927, page 43; Schedule of Wages for 1927, as amended, effective July 1, 1927, page 44; Schedule of Wages for 1928, page 41; Schedule of Wages for 1929, page 47; and Schedule of Wages revised to July 23, 1931, page 59, all contain the same provisions as that of the 1924 schedule quoted above.

Schedule of Wages revised to March 1, 1936, pages 55–56 provided:

For work on legal holidays within the employee's regular tour of duty, the schedule rate of pay shall be allowed, and in addition thereto gratuity pay for the legal holiday.

Gratuity pay shall be allowed for legal holidays not within the employee's regular tour of duty and upon which no work is performed.

* * *

For work on legal holidays, not exceeding 8 hours, when not a part of the employee's regular tour of duty, performed under proper authority, the schedule rate of pay, plus 50% additional, shall be allowed, and in addition thereto, gratuity pay for the legal holiday.

For work in excess of 8 hours on Sundays or legal holidays, when such days are not a part of the employee's regular tour of duty, performed by reason of an extraordinary emergency, 50% additional to the Sunday or holiday rate of pay, or 125% additional to the schedule rate of pay, shall be allowed.

10. Public Resolution No. 127 (52 Stat. 1246), enacted on June 29, 1938, provided as follows:

That hereafter whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piecework basis are relieved or prevented from working *solely* because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Tranksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments

and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

SEC. 2. The joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed *to the extent of such inconsistency or conflict.*

11. The Secretary of the Navy was informed by the Comptroller General, in decision of July 6, 1938, A–94536, 18 Comp. Gen. 10, that gratuity pay for holidays was no longer a vested right of per diem employees but that such employees were then entitled to pay for holidays only under and subject to the conditions of the Joint Resolution. The Comptroller General further held in decision of August 19, 1938, A–97193, 18 Comp. Gen. 188, as follows:

> Hence regular per diem, per hour and piecework employees are entitled to their regular pay for holidays on which no work is performed only if and when they are "relieved or prevented from working solely because of the occurrence of" the holiday. If they are relieved or prevented from working on the holiday for any reason other than the occurrence of a holiday such as when the holiday occurs on a non-workday or within a period of furlough or leave of absence, no pay for the holiday as such is authorized. If such employees are required to work on a holiday occurring within their regular tour of duty, only one day's pay is authorized—payment of gratuity holiday pay in addition being no longer authorized. If the holiday occurs on a day outside the regular tour of duty of 40 hours per week and work is required on the holiday, the employee is not entitled to 2 days' pay, one for working and one for the holiday, but may be entitled to overtime pay for the day under administrative regulations at a rate not less than one and one-half times their regular pay.

12. Navy Department Circular Letter of August 17, 1938, based on the 1938 resolution and the Comptroller General's opinion A–94536, deleted the provision of the Schedule of Wages revised to March 1, 1936, quoted in finding 9 hereof and substituted therefor:

> For work on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are

closed by Executive Order, within the employee's regular tour of duty, the schedule rate of pay shall be allowed.

Whenever an employee is relieved or prevented from working solely because of the occurrence of any day declared a holiday by Federal statute or Executive Order, or any day on which the departments and establishments of the Government are closed by Executive Order, he shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

For work on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are closed by Executive Order, not exceeding eight hours, when not a part of the employee's regular tour of duty, performed under proper authority, the schedule rate of pay plus 50% additional shall be allowed.

For work in excess of eight hours on Sundays or on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are closed by Executive Order, when such days are not a part of the employee's regular tour of duty, performed by reason of extraordinary emergency, 50% additional to the Sunday or holiday rate of pay, or 125% additional to the schedule rate of pay shall be allowed.

Schedule of Wages, effective November 18, 1940, page 63; Schedule of Wages, revised to November 30, 1943, page 29; and Schedule of Wages, revised to October 16, 1944, pages 21–22, restated the provisions of the Circular Letter of August 17, 1938 quoted above, with some minor variations in wording.

Navy Civilian Personnel Instructions, NCPI 250.7–12 and 250.7–13 of April 13, 1945, continued the substantive provisions of the Circular Letter of August 17, 1938.

NCPI 250 Amendment 2 of September 20, 1945 substituted for provisions originated in the Circular Letter of August 17, 1938 quoted above, the following:

a. Per diem employees shall be allowed compensation at the rate of true time and one-half for work on a Sunday or holiday falling outside the regular tour of duty, provided they have been in a pay status during the regular 40-hour tour of duty.

b. For work on a Sunday or holiday falling within the regular 40-hour tour of duty, per diem employees are

allowed the same rate of pay as for any other day within the regular tour of duty.

13. In recognition of the construction of the Comptroller General of the Joint Resolution of June 29, 1938, there were introduced into Congress several bills to restore holiday gratuity pay rights similar or in addition to those conferred by prior statutes upon per diem employees. None of such bills was enacted into law. The first such bill was House Joint Resolution 303, 76th Cong., 1st Sess., which was introduced by Mr. Darden and referred to the Committee on Civil Service May 24, 1939 (84 Cong. Rec. 6111), and read as follows:

> That Public Resolution numbered 127, Seventy-fifth Congress approved June 29, 1938 entitled "Joint Resolution providing compensation for certain employees" be amended by striking out all after the resolving clause and substituting in lieu thereof the following:
> "That hereafter whenever employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are granted a holiday by Executive Order, or whenever the departments and establishments of the Government are closed by Executive Order in observance of a public event, they shall receive the same pay for such days as on other days on which an ordinary day's work is performed and all Acts or parts of Acts repealed or modified by the Act of June 29, 1938 (Public Resolution No. 127, 75th Cong.) are hereby restored to full force and effect."

On May 30, 1939, Robert Ramspeck, Chairman, Committee on Civil Service, House of Representatives, requested a report of the Civil Service Commission regarding the proposed legislation. On October 31, 1939, the president of the Civil Service Commission, Harry B. Mitchell, replied, stating that:

> It will be seen, therefore, that the Joint Resolution of June 29, 1938, thus interpreted [by the Comptroller General] instead of conferring the additional benefits of pay for days declared holidays by Executive Order, may operate to deprive a per diem employee of the gratuity pay for *statutory holidays*, a benefit which for more than fifty years has been regarded as in the nature of a vested right. This interpretation of the statute grants no additional pay to a per diem employee who is required to work on a statutory holiday occurring within

his regul[ar tour of duty, while a per diem employee with
exactly t[he same tour of duty who is not required to
work re[ceives exactly the same pay for the holiday.
Further, [the receipt of pay for statutory holidays upon
which p[er diem employees are not required to work is
depende[nt upon circumstances which may be purely
fortuito[us, such as the occurrence of a holiday upon an
administ[rative non-work day, or within a period of
furlough [or leave without pay. In other words, if two
per diem[employees performing exactly the same work
are assig[ned to different tours of duty, one including a
statutory[holiday, and the other excluding it, the em-
ployee a[ssigned to the former tour will receive pay for
the holid[ay, whereas the employee assigned to the latter
tour wil[l not, although neither employee is required to
work on[that day. Since H. J. Res. 303 will adjust
any ineq[ualities as between per diem employees them-
selves, th[e Commission believes that favorable consider-
ation sho[uld be given to the bill.

The B[ureau of the Budget has advised this office that
the enac[tment of H. J. Res. 303 in its present form
would n[ot be in accord with the program of the Presi-
dent. T[he Bureau states, however, that there would
be no o[bjection to the enactment of legislation which
would p[ermit the payment of compensation to a regular
per die[m employee when absent from duty for any
cause on[a holiday occurring within the tour of duty.

In the 77t[h Cong., 1st Sess., there was introduced H. R.
1386, a bill [to grant all employees of the United States
Government [equal rights and privileges with respect to all
established [national holidays. H. R. 1386, introduced by
Mr. Darden [and referred to the Committee on Public Build-
ings and Gr[ounds on January 6, 1941 (87 Cong. Rec. 47),
reads as foll[ows:

That [all employees of the United States Government
whose t[our of duty requires them to work on any na-
tional h[oliday for any reason whatsoever be not deprived
of the b[enefits of any such holiday as to gratuity pay as
may be [established by Congress.

SEC. [2. Where and whenever a holiday falls during
any em[ployees' tour of duty, such as employees of Gov-
ernmen[t power plants, Fire Department employees, tele-
phone o[perators, guards and other maintenance workers
who m[ay be required to work on holidays, that such
employe[es be either granted extra compensation over and
above t[he gratuity pay allowed by congresssional action
for all [national holidays or that the employees be granted

time out for such work on any holiday, and during the week in which a holiday falls.

SEC. 3. Compensation for holiday work shall be at one and one-half times the regular rate of pay and shall be in addition to the gratuity pay allowed for holiday. Where time out is granted for holiday work in lieu of compensation, such time shall likewise be granted on the same basis as the overtime rate of pay.

SEC. 4. After the passage of this Act, it shall be unlawful to work any employee of the United States Government in excess of thirty-two hours a week in which a national holiday falls, and for which said employee shall receive pay for forty hours' work; except that the stipulations of section 3 of this Act shall be complied with.

On January 14, 1941, Robert Ramspeck, Chairman, Committee on Civil Service, transmitted a copy of H. R. 1386 to the Civil Service Commission and requested a report of the Commission's views regarding the proposed legislation. On July 21, 1941, the Acting President, Lucille Foster McMillin, Civil Service Commission, replied, recommending certain changes and favorable consideration of the bill and stating further that the Bureau of the Budget had advised that the enactment of H. R. 1386, either in its present form, or in the amended form suggested by the Civil Service Commission, would not be in accord with the program of the President. but that there would be no objection to the enactment of legislation which would permit the payment of compensation to a regular per diem employee when absent from duty for any cause on a holiday occurring within his tour of duty.

There was introduced in the 77th Congress, 1st Session, S. 1930 (introduced September 24, 1941 by Senator Byrd and referred to the Senate Committee on Naval Affairs, 87 Cong. Rec. 7526) and H. R. 6222 (introduced December 15, 1941, by Mr. O'Toole and referred to the House Committee on Civil Service, 87 Cong. Rec. 9750). S. 1930 and H. R. 6222 both read as follows:

That the first section of the joint resolution entitled "Joint Resolution providing compensation for certain employees," approved June 29, 1938, is amended by inserting before the period at the end thereof a colon and the following:

"*Provided*, That whenever any employee of the Federal Government who is employed at any Navy yard or naval station is required to work on any such holiday

or day on which the departments and establishments of the Government are closed by Executive order, he shall be allowed compensatory time off on one other workday within the week following such holiday or, in lieu thereof, be paid one additional day's pay at his regular rate."

In the 79th Congress, 2d Sess., S. 1679, "A bill to authorize additional compensation for work performed on a legal holiday by employees of the Government Printing Office," was passed by the Senate on March 5, 1946 (92 Cong. Rec. 1919) and provided as follows:

That employees of the Government Printing Office who are required to work on days designated by Federal statute or Executive order as holidays are entitled, for the time worked, to their regular rate of compensation in addition to the regular pay for the holiday.

S. 1679 was not passed by the House.

14. In the 77th Congress, 1st Session, there was introduced H. R. 1642, a proposed amendment to Public Resolution No. 127, to include per diem employees of the District of Columbia Government and to leave the substantive provisions of the Resolution unchanged. H. R. 1642 passed the House on June 2, 1941 (87 Cong. Rec. 4624) after the construction placed upon Public Resolution No. 127 by the Comptroller General had become well known and after other bills such as H. J. Res. 303, 76th Congress had been introduced to change the substantive effect of the Public Resolution as construed by the Comptroller General. H. R. 1642 was not passed by the Senate.

15. The Secretary of the Navy issued the following directives providing for wartime holiday work by Navy employees and disciplinary action against employees failing to report for work on holidays:

October 29 1942 ALNAVSTA 291330

BECAUSE OF THE NECESSITY FOR EXPEDITING WORK DUE TO WAR EMERGENCY 11 NOVEMBER ARMISTICE DAY X WILL BE A WORK DAY FOR ALL EMPLOYEES OF THE NAVY DEPARTMENT X MARINE CORPS AND COAST GUARD AND THEIR FIELD SERVICES PARAGRAPH EMPLOYEES WILL RECEIVE THEIR REGULAR COMPENSATION FOR WORK PERFORMED ON ARMISTICE DAY X EXCEPT

THAT EXSTING OVERTIME PROVISIONS APPLY X ER ANNUM EMPLOYEES WHO ARE DIRECTED TO REPORT FOR WORK ON THE HOLIDAY AND DO NOT REPORT FOR WORK ON THAT IAY SHALL NOT BE PAID FOR THE HOLIDAY X PER DIEM EMPLOYEES WHO ARE DIRETED TO WORK ON THE HOLIDAY AND DO NOT REPORT FOR WORK ON THAT DAY SHAL BE MARKED OUT AND APPROPRIATE DSCIPLINARY COGNIZANCE TAKEN OF FAILURE TO REPORT FOR DUTY PARAGRAPH I ACCORDANCE DECISION COMP. GEN. 2 APIL NO CHARGE SHALL BE MADE AGAINST HE ANNUAL OR SICK LEAVE ACCOUNTS O PER ANNUM AND PER DIEM EMPLOYEES FOR ABSENCE ON THE HOLIDAY WHETHE WITH OR WITHOUT AUTHORITY.

August 17 143 ALNAVSTA 172309

IN ACCOIDANCE WITH A DIRECTIVE OF THE PREIDENT 12 MAY THAT NECESSITY FOR MAITAINING MAXIMUM OUTPUT IN GOVERNMENT ACTIVITIES THROUGHOUT THE WAI PERIOD REQUIRES THAT DAYS NORMALLY OBSERVED BY THE DEPARTMENTS ND AGENCIES AS HOLIDAYS SHOULD WITH EXCEPTION OF CHRISTMAS BE ONSIDERED AS REGULAR WORK DAYS FO DURATION OF WAR X LABOR'S HOLIDAYS SEPTEMBER AND ALL SUCCEEDING HOLDAYS X WITH EXCEPTION OF CHRISTMS WILL BE WORK DAYS FOR ALL EMPLOYES OF THE NAVY DEPARTMENT X HEADQURTERS US MARINE CORPS AND HEADQURTERS US COAST GUARD AND THEIR FELD SERVICES X INSTRUCTIONS REGARDNG ARMISTICE DAY IN ALNAVSTA 291330 OCOBER 1942 APPLY.

16. On May 1, 1943, the following White House Memorandum was issd:

To the Heis of Executive Departments and Agencies
Subject: Oservance of holidays during the war period

The neceity for maintaining maximum output in Governmer activities throughout the war period requires thatlays normally observed by the departments and agenci as holidays should, with the exception of

Christmas, be considered as regular work days for the duration of the war.

By direction of the President:

(S) Wm. H. McReynolds,
Administrative Assistant to the President.

This Presidential directive was reaffirmed on December 17, 1943, by Mr. W. H. McReynolds, Administrative Assistant to the President, in the following statement addressed to the heads of the Federal Departments and Agencies:

On May 13, 1943, by direction of the President, I issued the following statement concerning the observation of holidays:

"The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with exception of Christmas, be considered as regular work days for the duration of the war."

This policy is consistent with the attitude of the Government toward maintenance of full production in war industry on Holidays other than Christmas.

The President has reaffirmed his desire previously expressed on this matter.

There is full realizaion of the long hours which Federal employees are continuously working in the interest of the war effort and of the fact that holiday work is performed by Federal employees without additional compensation. The policy with respect to work on holidays will be reconsidered at the earliest possible moment that progress in the war will permit.

Christmas Day and Christmas Eve have traditionally been important family days in the life of this Nation. The President has indicated that the heads of departments and agencies may, in their discretion, permit offices or establishments to be closed or any employees whose services can be spared to leave their work not earlier than two hours in advance of the usual closing time on Christmas Eve, December 24.

With respect to forthcoming holidays, other than Christmas, you are advised that the President expects them to be observed as regular working days.

Accordingly, per annum and per diem employees of the United States were required to work on all succeeding holidays except Christmas until August 23, 1945, when the eight paid holidays were restored by White House Memorandum.

17. The Federal Employees Pay Act of 1945 (59 Stat. 295), effective July 1, 1945, authorized holiday premium pay at the rate of time and one-half "in lieu of their regular pay" when graded employees were required to work on a holiday. This law thus created an inequity between the two groups of employees—graded and ungraded. With a view to correcting this inequity, the Secretary of the Navy and the Secretary of War in a joint letter to the Comptroller General asked whether the heads of the two departments by administrative order could authorize holiday premium pay for ungraded employees required to work on holidays. The Comptroller General ruled in the affirmative on February 7, 1946 (25 Comp. Gen. 584). By official order dated February 19, 1946 (Alnavsta No. 11), the Secretary of the Navy directed that all ungraded employees required to work on a holiday falling within the regular workweek be paid for such work at the rate of time and one-half in lieu of their regular rate. Bergh was an ungraded employee within the meaning of the Federal Employees Pay Act of 1945.

18. On September 9, 1942, the President, in Executive Order No. 9240, 7 F. R. 7159, limited the holiday pay of persons employed in war work, effective October 1, 1942, as follows:

> Whereas many labor organizations have already adopted the patriotic policy of waiving double time wage compensation or other premium pay for work on Saturday, Sunday and holidays, as such, for the duration of the war; and
>
> Whereas it is desirable and necessary in the prosecution of the war, and to insure uniformity and fair treatment for those labor organizations, employers and employees who are conforming to such wage policies that this principle be universally adopted.
>
> Now, therefore, by virtue of the authority vested in me by the Constitution and the statutes, as President of the United States and as Commander in Chief of the Army and Navy, it is hereby ordered:
>
> I. That the following principles and regulations shall apply for the duration of the war to the payment of premium and overtime wage compensation on all work relating to the prosecution of the war:
>
> A. No premium wage or extra compensation shall be paid to any employee in the United States, its territories or possessions, for work on Saturday or Sunday except

where such work is performed by the employee on the sixth or seventh day worked in his regularly scheduled workweek and as hereinafter provided.

(1) Where because of emergency conditions an employee is required to work for seven consecutive days in any regularly scheduled workweek a premium wage of double time compensation shall be paid for work on the seventh day.

(2) Where required by the provisions of law or employment contracts, not more than time and one-half wage compensation shall be paid for work in excess of eight hours in any day or forty hours in any workweek or for work performed on the sixth day worked in any regularly scheduled workweek.

B. No premium wage or extra compensation shall be paid for work on customary holidays except that time and one-half wage compensation shall be paid for work performed on any of the following holidays only:

New Year's Day	Thanksgiving Day
Fourth of July	Christmas Day
Labor Day	

and either Memorial Day or one other such holiday of greater local importance.

II. All Federal departments and agencies shall conform the provisions in all existing and future contracts negotiated, executed, or supervised by them to the policies of this order. All such departments and agencies shall immediately open negotiations to alter provisions in existing contracts to conform them to the requirements of this order.

III. Nothing in this order shall be construed as requiring a modification of the principle that every employee should have at least one day of rest in every seven days. The continuous operation of plants and machines in prosecuting the war does not require that employees should work seven consecutive days.

IV. Nothing herein shall be construed as superseding or in conflict with the provisions of the statutes prescribing the compensation, hours of work and other conditions of employment of employees of the United States.

V. All Federal departments and agencies affected by this order shall refer to the Secretary of Labor for determination questions of interpretation and application arising hereunder.

* * * * *

Interpretative Bulletin No. 1 of Executive Order 9240, U. S. Department of Labor, Office of the Secretary, dated February 17, 1943, contained the following provisions:

> The Secretary of Labor, pursuant to Section V, is authorized and directed to interpret the provisions of Executive Order 9240. This bulletin is intended to set forth the Secretary's interpretations. The Order was designed (1) to facilitate 'round-the-clock war production, (2) to discourage absenteeism found to have resulted from the practice of paying premium rates for particular days as such, and (3) to assure, in the interest of efficiency and health, observance of the principle that workers should have at least one day of rest in each week. The interpretations embodied in this bulletin have been made after a number of months of experience under the Order and are believed to be in accord with its purpose.
>
> * * * * *
>
> ## II. COVERAGE
>
> * * * * *
>
> * * * Agricultural workers and *employees of Federal or State Government, and political subdivisions thereof, are not subject to the Order.*
>
> * * * * *
>
> ## VIII. HOLIDAYS
>
> 15. Paragraph I B of the Order has two requirements: (1) It requires time and one-half for work on the 6 holidays enumerated in the Order, and (2) it forbids payment of any premium wage or extra compensation for work on any other holidays as such. A choice is afforded between Memorial Day and any other holiday of greater local importance. Failure to select a substitute holiday leaves Memorial Day as the sixth holiday under the Order. The holiday chosen as a substitute for Memorial Day need not be the same holiday each year but only 6 holidays may be paid for at premium rates in the 12-month period beginning October first.
>
> 16. The Order requires that time and one-half compensation be paid for work on designated holidays but forbids payment in excess of time and one-half. Thus, if the wages of an employee include compensation for a holiday although not worked, the additional amount which must be paid under the Order for work performed on that holiday is limited to such amount as

brings the total compensation for the day to time and one-half.

17. Compensation for work performed on a holiday should be computed at one and one-half times the straight-time rate paid for work on that day or one and one-half times the average straight-time hourly rate for the workweek, whichever is the customary method of computing overtime compensation. The employer's records should indicate which method is adopted.

18. For purposes of computing the seventh day of work in a workweek under the Order, the designated holidays must be included in the count whether or not work is performed on such days. An idle holiday should be included in computing the sixth day worked in the workweek unless the employment contract specifies otherwise.

19. Insofar as the Order requires payment of time and one-half for work on the designated holidays, it means payment of time and one-half for the hours worked on the calendar holiday, namely, hours worked between midnight at the beginning of the holiday and midnight at the close of the holiday.

20. However, in order to give all employees equal benefit of the holiday, it is permissible to compensate employees at time and one-half for all hours worked on a shift, some part of which cuts across the calendar holiday. It is not permissible to pay the time and one-half holiday rate for more than one shift in a situation in which the employee works two shifts, both of which cut across the calendar holiday. However, employees must be paid time and one-half for at least all the hours worked on the calendar holiday.

21. If one of the designated holidays falls on Sunday, either Sunday or Monday may be observed as the holiday, but not both.

22. There is no provision in the Order relating to compensation on holidays not worked.

* * * * *

Because its Zone Pay Standards were substantially identical to the provisions of Executive Order 9240 the shipbuilding and ship-repair industry was exempted from the terms of Executive Order 9240 (by order of Secretary of Labor, dated February 25, 1943). By these Zone Standards, employees of the shipbuilding and ship-repair industry were paid time and one-half for work performed on specified holidays during the period from July 19 1952, to October 6, 1945.

19. The wage and working conditions of Bergh and a first-class electric welder employed by the largest privately owned shipyard in the Norfolk, Va., area, the Newport News Shipbuilding and Dry Dock Company, Newport News, Virginia, on January 1, 1945, were as follows:

Bergh (Navy):	Newport News Shipbuilding & Welder Dry Dock Co.:
1. Rate of pay:	
(a) Night shift, $1.57 per hour.	Unknown.
(b) Day shift, $1.51 per hour.	
(c) Holiday pay, same as above.	1½ regular rate on 6 specified holidays per year if worked.
2. Vacation: 26 days per year.	One week per year for employees with 2 years continuous service. Two weeks per year for employees with 10 years continuous service.
3. Sick leave: 15 days per year.	None.
4. Paid holidays: 8 days per year.	None.
5. Retirement: Civil Service.	Social Security.
6. Bonus plan: None.	None.
7. Hospitalization (in addition to on-the-job injury): None.	Employee-company participation.
8. Insurance (in addition to on-the-job injury): None.	Employee-company participation.

The holidays worked and pay received therefor by production employees of the Newport News Shipbuilding and Dry Dock Company during 1945 were as follows:

January 1, 1945.	Holiday worked.	Pay and ½ received.
February 22, 1945.	Holiday worked.	Straight pay received

(George Washington's Birthday not a holiday specified in collective bargaining agreement or Zone Standards)

May 30, 1945.	Holiday worked.	Pay and ½ received.
July 4, 1945.	Holiday worked.	Pay and ½ received.

September 3, 1945.	Holiday not worked.	No pay received.
November 12, 1945.	Holiday worked.	Straight pay received.

(Armistice Day not a holiday specified in collective bargaining agreement)

November 22, 1945.	Holiday not worked.	No pay received.
December 25, 1945.	Holiday not worked.	No pay received.

20. No other action has been taken on this claim in Congress or by any of the Departments; no person other than Bergh is the owner thereof or interested therein; no assignment or transfer of this claim or any part thereof, or interest therein has been made.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiffs are entitled to recover.

Entry of judgment is suspended pending the filing of a report by the General Accounting Office showing the amount due each plaintiff in accordance with this decision.

Supreme Court of the United States

No. —

October Term, 1955

UNITED STATES OF AMERICA, PETITIONER

vs.

ALFRED C. BERGH, ET AL.

Order extending time to file petition for writ of certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 9th, 1955.

[S] EARL WARREN,
Chief Justice of the United States.

Dated this 7th day of October 1955.

(28)

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HAROLD B. WILLEY,

No. ~~553~~ 17

IN THE

Supreme Court of the United States

October Term, 1955

UNITED STATES OF AMERICA, *Petitioner*

v.

ALFRED C. BERGH, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 553

IN THE

Supreme Court of the United States

October Term, 1955

UNITED STATES OF AMERICA, *Petitioner*

v.

ALFRED C. BERGH, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Whether the Joint Resolution of June 29, 1938 (52 Stat. 1426, 5 U.S.C. 86(a)[1]) operates to repeal the Joint Resolution of January 6, 1885 (23 Stat. 516, 5 U.S.C. 86[2]), requiring the payment of so-called "holiday gratuity pay" or extra compensation to federal per diem employees for work performed on holidays.

[1] This statute is set forth in the Petition for Writ of Certiorari herein, p. 2.

[2] This statute is set forth in the Petition for Writ of Certiorari herein, p. 3.

Reasons for Denial of Writ

The United States Court of Claims has meticulously considered the issue which petitioner herein is asking this Court to review, not only once but on two separate occasions. Its lengthy and well-reasoned opinions rendered on both of these occasions (in the latter of which the Chief Judge joined although he had dissented from the first) demonstrate the lack of merit in the position taken by the Government in respect to this issue. The decision below is clearly correct, so that there is no need for this Court to grant the Petition for Writ of Certiorari herein.

In determining the error in petitioner's position, it is necessary to bear in mind the precise question which lies at the heart of this case and which has been resolved by the Court below adversely to the Government. That question is not, as framed in the petition herein (p. 2), whether federal per diem employees are entitled to an extra day's pay for work on holidays during the period of World War II when such holidays were made regular working days by administrative decree. Rather, the question is whether the Congressional Joint Resolution of 1938, enacted prior to World War II and upon which the Government relies exclusively as reason for denial of such extra day's pay,[1] has as its purpose and effect the repeal of existing statutory law (the Joint Resolution of 1885) which had been consistently construed and applied to require the payment of extra pay to per diem employees who were required to work on

[1] At no time in its arguments before the Court of Claims, i.e., either in the **Kelly** case or in the present one, did the Government contend that the May 12, 1943, directive of the President, requiring holiday work during the war period, operated in itself to repeal the 1885 Joint Resolution. It is fundamental that the Executive may not overrule the express or implied will of Congress respecting the status, tenure or compensation of federal employees. **Roth v. Brownell**, 215 F. 2d 500; **Youngstown Sheet & Tube Co. v. Sawyer**, 343 U.S. 579.

holidays.[1] Talk, therefore, of wartime requirements for work on holidays is entirely immaterial, and the Government's stressing of the wartime factor is entirely misplaced. It was precisely because the meaning and the effect of the law passed in 1938, and the intent of Congress as of that time was the basic issue before the Court of Claims that that Court "overlooked" (as petitioner phrases it, Petition p. 14) the wartime situation which came into existence some five years after the law whose effect the Court was being asked to determine had been enacted. Further and for that same reason, the considerations which the petitioner enumerates as "affording in normal times . . . ample justification for paying an employee bonus or premium pay when he works on a holiday" are quite relevant to a determination of whether the Congress intended to ignore them in legislation passed in the normal (i.e., non-war) year of 1938. These considerations as enumerated by petitioner (pp. 13, 14 of its Petition herein) are as follows:

> "Holiday work is more onerous and burdensome than work on a regular week day. A holiday is a day for religious, patriotic, or recreational pursuits. Assignment to holiday work involves on the part of the employee a departure from the normal way of living. These considerations justify payment of premium pay to those Federal employees who are required to work when other Federal employees are excused from work and allowed to enjoy an uninterrupted holiday without loss of pay."

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[1] The question was framed by the Court of Claims in its decision below as follows: "Did the Joint Resolution of 1938 operate to repeal the prior Congressional enactment?" (App. to Petition, p. 2.) That is the question which was presented and litigated before the Court of Claims in both the Kelly case (Kelly v. United States, 119 C. Cls. 197) and in the present one, and before this Court in United States v. Kelly, 342 U.S. 193, although that case was decided by this Court on other grounds.

Surely, it would seem to require much more specific language than that contained in the Joint Resolution of 1938 to convince that Congress then intended to disregard considerations such as the foregoing and to overturn a 40-year practice of granting premium pay to federal per diem employees who were required to work on holidays.

1. We start with the fact that in 1938, when Congress passed the Joint Resolution whose effect this Court is being asked to determine, there was in effect and had been in effect for over 50 years a law which the Court below, as well as this Court, had found to be "consistently administered as providing for gratuity pay in addition to regular compensation if the employee worked on a holiday" (342 U.S. at 194).[5] The construction given the 1885 Resolution by the Comptroller General of the Treasury (13 Comp. Dec. 40) is illuminating. He held in respect to the 1885 and 1895 Acts as follows:

> "These statutes allow or grant to certain employees of the Government the holidays specified with regular pay. The pay is not for service performed or labor performed, but is a gratuity. It is not intended that the employees shall perform any service for the pay given them by these joint resolutions. The pay has no relation to work. If the public interests require that these employees shall work on the stated holidays and they do work, then if they receive only the pay given by the joint resolutions they have not been paid for their labor, but have received merely the gratuity which they were entitled to without working. They are, there-

[5] Although this Court made such determination in respect to the Act of 1895 (28 Stat. 601, 607, par. 46), that Act, relating to Government Printing Office employees, was the exact counterpart of the Joint Resolution of 1938, and this Court cited opinions of the Comptroller of the Treasury construing the 1885 Resolution to grant gratuity pay. (8 Comp. Dec. 322 (1901); 13 Comp. Dec. 40 (1906); 3 Comp. Gen. 411 (1924).)

fore, entitled to pay at the rate of their regular per diem pay for work on the holidays in addition to the gratuity pay given them by the statutes referred to; that is, to double the amount of their regular per diem pay when they work all day."

2. It is to be noted that the 1938 Joint Resolution does not expressly repeal the 1885 enactment, but rather repeals it only to the extent of any inconsistency or conflict. Further, it is to be noted that the 1938 Resolution is, as found by this Court in the *Kelly* case, "silent on the subject of gratuity pay for holidays on which work was performed" (342 U.S. at 194), and the law in question deals by its express terms only with the subject of pay when per diem employees are *prevented* from working because of the occurrence of a holiday. It has been many times determined by this Court that repeals by implication are not favored. (see *Federal Trade Commission* v. *A.P.W. Paper Co.*, 328 U.S. 193); the general rule is that Congress will not be presumed to intend overturning long-established legal principles unless such intention is clearly evidenced by express declaration or necessary implication (*Koenigsberger* v. *Richmond Silver Mining Co.*, 158 U.S. 41; *Scarborough* v. *Atlantic Coast Line*, 178 F. 2d 253; 50 Amer. Jur., "Statutes," Sec. 34).

3. The 1938 Resolution can be applied consistently with the 1885 Resolution; there is no conflict between the language of the two statutes. The 1938 Resolution, read literally, operates simply to clarify the 1885 law in two respects: (1) It permits holiday pay for holidays on which no work is performed, but only if employees were prevented from working because of the occurrence of the holiday itself, and (2) it permits holiday pay for holidays that have been administratively decreed in addition to holidays that have been statutorily declared. Thus, there is nothing in the literal language of the 1938 enactment which is in any way

inconsistent with the Act of 1885 to the extent that the Act of 1885 requires premium pay for holidays on which work is actually performed and, of course, there is nothing in the language of the 1938 Resolution either directly or indirectly repealing such requirement for premium pay for holidays worked. If Congress had had any intention whatsoever of terminating the long-standing practice of paying premium pay for holidays worked, it could easily have done so by express language directed to that end. That it did not use such language is significant.

4. The legislative history of the Joint Resolution of 1938 is completely lacking in any indication whatsoever of an intent to abolish the practice of premium pay for holidays worked, nor indeed does that legislative history reveal even the suggestion of a complaint that it was inequitable or uneconomical or otherwise improper for the federal government to pay its per diem employees premium pay for holidays worked.* Far from the legislative history revealing any intent to repeal the 1885 enactment, that history reveals conclusively that Congress, in passing the 1938 Joint Resolution, was concerned solely with the two problems mentioned in paragraph 3 above, namely, the problem of giving

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* It was the general practice of private industry in 1938 to pay some type of premium pay for holidays worked, and, as pointed out by Judge Madden in the majority opinion in the Kelly case, 119 Ct. Cls. 197, at 207, "in no case which we have heard of, or can imagine, could an employer maintain a practice whereby an employee who worked on a holiday received merely the same pay as one who did not work." The only available study for the period immediately preceding 1938 which is in any way comprehensive of the situation respecting the payment of extra pay for holidays worked is that of F. Beatrice Brower for the National Industrial Conference Board, New York City (1937), "Personnel Practices Governing Factory and Office Administration." The study covered some 350 industrial concerns. The report found that over 60 per cent of these companies paid some type of premium or gratuity to their employees for work performed on holidays, the extra pay varying from one and one-quarter times the regular rate up to double time.

the same status for gratuity pay purposes to holidays established by executive order as to holidays established by statute, and the problem of eliminating a situation under which a per diem employee, although not called to work, received gratuity pay on holidays which fell on a day such as Sunday when the employee would not have worked in any event. This legislative history is set forth fully in the majority opinion of Judge Madden in the *Kelly* case. In summary, the 1938 Resolution was brought into being originally for the purpose of correcting an injustice to wage-rate employees which grew out of an Executive Order, dated December 6, 1937, excusing federal employees from duty on December 24, 1937. (Executive Order No. 7763, dated December 6, 1937; see H.R. Rep. No. 2683 (1938) 75th Cong., 3rd Sess.) Since the Executive Order failed to provide pay for the holiday, wage-rate employees lost their wages for the day. To remedy this situation, Mr. Ramspeck introduced a Resolution (H.J. Res. 551, introduced on January 5, 1938) in the House of Representatives, providing compensation for such employees who were excused from duty on that day. This Resolution was referred to the Committee on Civil Service. The Committee was advised by the United States Civil Service Commission that "there is the broader question involved of securing statutory authority for such payments as a general practice and thus obviate the necessity for special resolutions by Congress." (H.R. Rep. No. 2683, page 2.) Thus, it is clear that the immediate purpose of the 1938 Resolution was to eliminate the loss of wages by wage-rate employees caused by administratively-decreed holidays. See, in addition, 83 Cong. Rec. 9466 (1938).

In regard to the problem of eliminating the practice of paying gratuity pay to wage-rate employees, even though they did not work and even though the holidays fell on a

non-working day, the debates and discussions attending the 1938 Resolution throw no particular light on the subject, but the Committee Report above referred to makes it quite clear that Congress did have this problem in mind. The Committee Report incorporates a letter from the Acting Comptroller General to the Secretary of the Navy. That letter in relevent portion stated as follows:

> ". . . when any of such holidays falls on a nonworkday (such as a Saturday), such employees receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned, and double compnesation for the day if work is performed thereon." . . .
>
> "During the calendar year 1936 navy yard per diem employees, as well as other per diem employees of the Government to whom the 40-hour-week statute is applicable, were paid 3 days' gratuity pay under the holiday statutes, over and above their full earnings for the year, by reason of the fact that February 22, May 30, and July 4, 1936, fell on Saturday nonworkdays. (See 15 Comp. Gen. 700 id. 809.) It is noted in this connection that December 25, 1937, and January 1, 1938, each will fall on a Saturday.[4]

It is obvious that this passage does not refer to gratuity pay for wage-rate employees required to work on a statutory holiday occurring on a *regular workday*. The reference to "double compensation" relates to the payment of such compensation to wage-rate employees required to work on a statutory holiday occurring on a nonworkday. Clearly, if gratuity pay is eliminated for statutory holidays occurring on nonworkdays, the employee required to work on such days would not receive "double compensation," but would merely receive his regular rate of pay for the day. Thus, it is apparent that the Committee Report did not specifi-

cally deal with the subject of gratuity pay for employees required to work on statutory holidays occurring *on regular lar workdays* although it did consider the question of gratuity pay for holidays occurring on nonworking days where employees are not called to work.

In summary, then, the legislative history discloses no purpose to eliminate the forty years' practice of paying gratuity pay in addition to regular pay to employees called in to work on a holiday occurring on a regular working day but, on the contrary, shows concern only with the two problems above referred to. The language of the Resolution is quite apt to cope with these problems, and thus there is no question of disregarding or nullifying any language of the statute on the ground that Congress used such language inadvertently. On the other hand, the language should not be given the additional application contended for by petitioner, which all circumstances indicate Congress did not intend.

The petitioner argues that the fact that annually-paid federal employees receive no premium pay for holidays on which they are called to work created an inequity which it was the purpose of the 1938 Joint Resolution to correct, but there is no evidence whatsoever in the legislative history of that Resolution that Congress was in any way concerned with that particular problem, if indeed there was any problem in a practice which had existed for over 45 years without complaint. The obvious difference between the status of a per diem employee with his greatly more secure tenure and a per diem craftsman who often can work only when weather permits would seem to outweigh any difference in treatment respecting pay for holiday work.

5. Statutes will not be construed to produce absurd or inequitable results. *Helvering* v. *Hammel*, 311 U.S. 504,

511 (1941); *United States* v. *Katz*, 271 U.S. 354, 362. The construction of the 1938 Joint Resolution contended for by the Government would produce extremely absurd results —results already manifested in decisions of the Comptroller General following the 1938 Resolution. See Decision A97265, August 29, 1938, which holds that an employee who was not required to work on a designated holiday occurring on a workday must nevertheless show facts and circumstances to prove that he would have worked but for the sole fact that it was a holiday. In other words, under the Government's interpretation, unless an employee is in fact ready, willing, and able to go to work on the designated holiday, he is not entitled to gratuity pay, despite the fact that he was not required to work on that day. Similarly, if a wage-rate employee were required to work two hours on a statutory holiday, he would be paid only for two hours of labor under defendant's interpretation. Thus, he would actually receive less pay than if he were not required to work on the holiday because he was not "relieved or prevented from working" on that day. Furthermore, it is to be noted that under the Government's construction of the 1938 Resolution and under the ruling of the Comptroller General in the present case, an employee who is required to work on a holiday occurring on a regular workday receives the same pay as but no more than the employee who stays at home. Certainly, it is not to be presumed, without very clear language or without a very clear expression of intent in the legislative history, that Congress was desirous of bringing about such an obviously inequitable result.

6. Petitioner (Petition, p. 17) expresses concern over possible heavy liability on the part of the Government if the decision below is permitted to stand. While this factor has no relevance in respect to a determination of

the meaning and purpose of the 1938 Joint Resolution, it should have been pointed out that there is a strong possibility that most of the claims filed with the General Accounting Office are barred by the statute of limitations. In any event, it is impossible to estimate just what the extent of the Government's liability is, although the probabilities are that the total amount will be far less than that estimated by petitioner.

Conclusion

All of the circumstances, including the legislative history of the 1938 Resolution, consideration of the inequitable results achieved by the Government's interpretation, and the language used in the 1938 Resolution itself, indicate that Congress did not intend, and could not have intended, in 1938, to eliminate the customary practice of paying gratuity pay for days worked on holidays occurring on a regular workday. Furthermore, the 1938 Resolution can be construed as it has twice been construed by the Court below without in any way doing violence to its language and without creating an inconsistency with the 1885 Act.

> "This being the situation, we think that the administrative officers of the Government and the courts have no duty, and indeed no right, to attribute to Congress an intention which, it is morally certain, Congress did not have, by giving to words which Congress used for one obvious purpose, an additional application which, taken literally, they might support. The evil which Congress meant to cure by the words it used, it cured. The additional effect contended for by the Government would destroy a practice which no one had ever even intimated to be an evil, and which responsible officials had, for more than forty years regarded as just and necessary." (Per Madden, J., in *Kelly* v. *United States, supra.*)

It is respectfully submitted that the Petition for Writ of Certiorari herein should be denied.

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Certificate of Service

Copies of the foregoing reply have been deposited in a United States mail box, with postage prepaid, addressed to the Solicitor General, Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 17

THE UNITED STATES, PETITIONER

v.

ALFRED C. BERGH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 13-18) is reported at 132 F. Supp. 462.

JURISDICTION

The judgment of the Court of Claims was entered on November 8, 1955 (R. 35-36). On October 7, 1955, by order of the Chief Justice (R. 36), the time for filing a petition for a writ of certiorari was extended to and including December 9, 1955. The petition for a writ of certiorari was filed on December 6, 1955, and was

granted on January 23, 1956. 350 U.S. 953. The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

QUESTION PRESENTED

During World War II, certain holidays were designated as regular work days for all federal employees. For their work on such holidays, per annum employees received no additional compensation and per diem employees were paid at their regular rate. The question presented by this case is whether per diem employees are also entitled, as a matter of statutory right, to an extra day's pay for each holiday worked.

STATUTES INVOLVED

1. The Joint Resolution of June 29, 1938, 52 Stat. 1246, 5 U.S.C. 86a, provided in 1945:[1]

> * * * whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days

[1] By Act of June 14, 1954, 68 Stat. 249, the Resolution was amended to substitute for "or any day on which the departments and establishments are closed by Executive order" the following: "or any day on which such employees are relieved or prevented from working by administrative order issued under such regulations as may be promulgated by the President."

as for other days on which an ordinary day's work is performed.

Sec. 2. The joint resolution of January 6, 1885 (U.S.C., title 5, Sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict.

2. The Joint Resolution of January 6, 1885, 23 Stat. 516, as amended by the Joint Resolution of February 23, 1887, 24 Stat. 644, 5 U.S.C. (1934 Ed.) 86, provided:

> * * * the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the day of each year which is celebrated as "Memorial" or "Decoration Day", the fourth day of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days.

3. The Act of July 16, 1862, c. 184, 12 Stat. 587, 34 U.S.C. 505, provides:

> [T]he rate of wages of the employees in the navy yards shall conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity of the respective yards, to be determined by the commandants of the navy yards, subject to the approval and revision of the Secretary of the Navy.

STATEMENT

This action was instituted in the Court of Claims by five per diem employees[2] of the Department of the Navy to recover an extra day's compensation for each legal holiday on which they worked during the year 1945. The claim of each employee is based on similar facts and raises identical questions of law. Consequently, the claim of Bergh (referred to as the respondent) was selected as a controlling test case. The relevant facts, as stipulated by the parties and as found by the court below,[3] may be briefly summarized.

On May 12, 1943, by direction of the President, the following memorandum was issued to the heads of all executive departments and agencies (R. 29):

> The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with the exception of Christmas, be considered as regular work days for the duration of the war.

On December 17, 1943, this directive was reaffirmed in a memorandum stating in pertinent part (R. 30):

* * * * *

> This policy is consistent with the attitude of the Government toward maintenance of full production in war industry on Holidays other than Christmas.

* * * * *

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[2] As used in this brief, a per diem employee is one whose compensation is fixed on a daily, hourly, or piecework basis, rather than on an annual basis.

[3] The findings of the Court of Claims (R. 18-35) follow verbatim the stipulation of facts. For that reason, only the preamble to the stipulation (R. 6) has been included in the printed record.

> There is full realization of the long hours which Federal employees are continuously working in the interest of the war effort and of the fact that holiday work is performed by Federal employees without additional compensation. The policy with respect to work on holidays will be reconsidered at the earliest possible moment that progress in the war will permit.
>
> * * * * *
>
> With respect to forthcoming holidays, other than Christmas, you are advised that the President expects them to be observed as regular working days.

For their work on such holidays, per annum employees received no additional compensation and per diem employees were paid at their regular rate.

One such per diem employee was respondent Bergh, a civilian employed as a welder at the Norfolk Naval Shipyard at Portsmouth, Virginia (R. 18). His rate of pay, computed on an hourly basis, was fixed administratively by the Navy Department, pursuant to the provisions of the Act of July 16, 1862, c. 184, 12 Stat. 587, 34 U.S.C. 505 (*supra,* page 3). This rate was reflected, during the period here relevant, by a Schedule of Wages promulgated by the Secretary of the Navy. The schedule contained, *inter alia,* provisions (1) incorporating the terms of the Joint Resolution of June 29, 1938 (*supra,* pp. 2-3), which authorizes payment of regular pay to per diem employees for those days on which they are prevented from working, and (2) stipulating that for work performed on a legal holiday the employee was to be allowed one and one-half times his

schedule rate of pay unless the holiday was a part of his regular tour of duty (R. 24).

Pursuant to the aforementioned directives, Bergh worked on New Year's Day (January 1, 1945), Washington's Birthday (February 22, 1945), Memorial Day (May 30, 1945), and Independence Day (July 4, 1945). For each of these days, all of which are legal holidays in peacetime, Bergh was paid, in accordance with the terms of the Schedule of Wages, at his regular rate (R. 18).

On March 10, 1952, Bergh submitted a claim to the Comptroller General for additional compensation equal to an extra day's pay for each day's work performed by him on the holidays listed above (R. 19). On March 28, 1952, this claim was disallowed (R. 19). Bergh then brought suit on the claim in the court below (R. 1-3). In granting the relief sought, the Court of Claims held that the 1938 Resolution did not "eliminate the customary practice of granting gratuity pay for days worked on holidays occurring on a regular work day" (R. 17). Judge Whitaker dissented (R. 18).

SUMMARY OF ARGUMENT

By this action, respondent seeks an additional day's pay for each of several holidays on which he performed work during World War II. In contrast with the wage-agreement involved in *United States* v. *Kelly*, 342 U.S. 193, the instrument setting forth the terms and conditions of respondent's employment is a Schedule of Wages promulgated by the Secretary of the Navy. The Schedule specifically provides that the regular rate of compensation is to be paid for holiday work performed by an employee within his normal tour of duty. The single issue here is, therefore, whether respondent

possessed a statutory right to double pay for holiday work—a right concededly not enjoyed by per annum employees—and whether, as a consequence, the provisions of the Schedule of Wages with respect to holiday work are invalid.

I

As this Court recognized in the *Kelly* case (342 U.S. at 194), the statute applicable to the matter of holiday pay for per diem employees during World War II is the Joint Resolution of June 29, 1938, 52 Stat. 1246, 5 U.S.C. 86a (*supra,* pp. 2-3), which provides that the employee is entitled to such pay as a matter of statutory right when he is "relieved or prevented from working solely because of the occurrence of a holiday." Since respondent was not prevented from working on the holidays here involved, but in fact did work and was paid for those days, the Resolution plainly does not confer a statutory right upon him to gratuity pay.

II

Nevertheless, the court below held that respondent was entitled to gratuity pay for the holidays on which he performed work. In this connection, the court relied on the Joint Resolution of January 6, 1885 (*supra,* p. 3), which had "allowed" per diem employees certain specified holidays with "the same pay as on other days" and which had been administratively construed to require double pay for holiday work. The 1885 Resolution, however, was superseded by the 1938 Resolution to the extent, if any, that the 1885 Resolution established a statutory right to gratuity pay for holiday work. This is shown by: (A) the language of the 1938 Resolution in its statutory context; (B) the legislative

history of the 1938 Resolution; and (C) its contemporaneous construction by the Comptroller General and the House Committee on Revision of the Laws.

A. Section 2 of the 1938 Resolution expressly provides that the 1885 Resolution "and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict." The "inconsistency or conflict" between the two statutes with respect to the matter involved here—gratuity pay for holiday work—would appear clear. The 1938 Resolution authorizes holiday gratuity pay on one condition and one condition only—namely, when per diem workers are *prevented* from working because of the holiday. Under the administrative interpretation of the 1885 Resolution, however, gratuity holiday pay was also allowed even when per diem employees were not prevented from working. The precise terms of the 1938 Resolution preclude such a construction.

Moreover, even apart from the matter of gratuity pay for holiday work, it is plain that the body of the 1885 Resolution—"allowing" certain listed holidays with "the same pay as on other days"—was necessarily superseded by the 1938 Resolution, which has its own provision for holiday pay and contains its own list of holidays. That being so, the administrative gloss relied upon by respondent could not have survived the elimination of the statutory basis for that gloss. When Congress repeals a statute, it is under no obligation to specifically enumerate the administrative rulings, based on the statute being repealed, that are thereby overruled. When the statute falls, so too do administrative rulings based on the statute.

B. The administrative interpretation given to the 1885 Resolution led to three instances of inequality between per annum and per diem employees with respect to holiday pay. Per diem employees, but not their per annum counterparts, received gratuity holiday pay in addition to their regular pay for holidays on which they worked and holiday pay for holidays falling on a non-working day. At the same time, while per diem employees were limited to the holidays specified in the governing legislation, per annum employees had the advantage of additional holidays declared by Executive Order.

The legislative history of the 1938 Resolution reveals an intent of Congress to equalize the position of per diem and per annum workers in the above respects. Per diem workers were, henceforth, entitled to pay for all holidays falling on working days; on the other hand, the Resolution abolished previously existing practices of mandatory double pay for holiday work and of holiday pay for holidays falling on non-working days.

The court below took the position, however, that the legislative purpose in enacting the 1938 Resolution was merely to award holiday pay for holidays declared by Executive Order and to abolish holiday pay for holidays falling on non-working days. Its reasoning was that Congress would not have abrogated, without specific words, the administrative practice of awarding double pay for holiday work as a matter of right. Additionally, the court below expressed the belief that Congress could not have intended either to put the Government at a comparative disadvantage in the obtaining of personnel necessary for the furtherance of the defense effort, or to allow a per diem employee who works

on a holiday to be paid no more than his fellow employee who is not required to work.

Even apart from the legislative history of the 1938 Resolution, this reasoning is unpersuasive. First, as already noted, when Congress undertakes to supersede prior legislation, it is not obliged to spell out in so many words an intent to put an end to all of the incidents and ramifications of the superseded legislation. Second, even if in 1938 the Government had been faced (as it was not) with personnel procurement problems in connection with national defense, the Resolution could not have interfered with their solution. Under the Resolution, premium pay for work performed on holidays is neither required nor prohibited; rather, the entire matter is remitted to the processes of collective bargaining and to agency discretion. Thus, where a premium for holiday work is recognized by the local prevailing wage scale, the rate of compensation for the per diem employee can be fixed accordingly, if deemed necessary or advisable. Third, since per annum workers, prior to the 1938 Resolution and for a number of years thereafter, received no additional compensation for work performed on holidays, it can fairly be said that, contrary to the view of the court below, Congress did not deem it to be inherently unjust to pay a Government employee the same amount for a holiday whether he is required to work or not.

C. The contemporaneous legislative and administrative interpretation of the 1938 Resolution fully accords with petitioner's reading of the legislative purpose. Shortly after its enactment, the Comptroller General ruled that the Resolution abolished the former practice of awarding double pay for holiday work as a matter of statutory right. The construction placed upon the

Resolution by the House Committee on Revision of the Laws, which supervises the preparation of the United States Code, is to the same effect.

III

The policy of non-observance of wartime holidays supports denial of gratuity pay to per diem employees for work on those holidays. Per annum employees worked, without gratuity compensation, on all of the holidays for which respondent seeks to recover extra pay. In granting recovery, the Court of Claims has thus placed per diem employees in a superior status denied to per annum employees by consistent legislative and administrative policy. Nothing in the terms or history of federal pay statutes justifies such discrimination. And, in any event, the wartime policy itself is a pertinent consideration in resolving the statutory question presented here.

ARGUMENT

Unlike the claim involved in *United States* v. *Kelly*, 342 U.S. 193, respondent's claim here is not based upon a collective bargaining agreement specifically providing for gratuity pay for work required to be performed on a legal holiday. Respondent's rate of compensation was fixed instead by a Schedule of Wages, promulgated by the Secretary of the Navy by virtue of the authority granted him by the Act of July 16, 1862, 12 Stat. 587, 34 U.S.C. 505 (*supra*, p. 3).[4] As respondent is com-

[4] Cf. *Determination of Wage Rates for Mechanical and Laboring Positions in the Federal Service*, (1944), 59 Monthly Labor Review 1063, 1066. As this article indicates, the Secretary of the Navy, in fixing wage rates, used wage schedules of the National War Labor Board and wage data collected by the War Department. If data was not available from these sources, the Secretary made his own surveys.

pelled to concede, nothing in that Schedule can be read as entitling him to twice his schedule rate of pay for holiday work. On the contrary, the Schedule is most explicit on the matter: for work on a legal holiday, the employee is to receive his regular rate of pay, plus an additional 50% if the holiday is not a part of his normal tour of duty; gratuity pay is authorized only with respect to holidays on which the employee is *prevented* from working (R. 24).

Thus, the question in this case is not whether respondent, because of a contract or because of the Schedule of Wages, is entitled to gratuity pay for holiday work. No contract is involved; and the Schedule of Wages is plain on its face. The question rather is whether, irrespective of the provisions of the Schedule of Wages, respondent possessed a statutory right to such pay. It is our position that the answer to this question—which this Court did not reach in *Kelly*[5]—is in the negative and that, in holding otherwise, the court below both ignored the terms of the applicable statute and disregarded its clear purpose and consistent administrative interpretation.

I

The Applicable Pay Statute—The Joint Resolution of June 29, 1938—Does Not Require the Award of Gratuity Pay to Per Diem Employees of the Navy Department for Work on Holidays During World War II.

As was noted by this Court in *United States* v. *Kelly*, 342 U.S. at 194, the statute applicable to the matter of

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[5] This Court stated in *Kelly* (342 U.S. at 195): "[The 1938 Resolution] was silent on the subject of gratuity pay for holidays on which work was performed, and we may even assume that it did not provide gratuity pay for those days."

holiday pay for Government per diem employees during the period here involved is the Joint Resolution of June 29, 1938, 52 Stat. 1246, 5 U.S.C. 86a. As of 1945, it provided in pertinent part:

> * * * whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis *are relieved or prevented from working solely because of the occurrence of a holiday* such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed. * * * [Emphasis added.]

Thus, under the Resolution, gratuity pay is provided for only in circumstances where the employee is "relieved or prevented from working solely because of the occurrence of a holiday." If the holiday prevents an employee from working, he gets gratuity pay; if it does not prevent him from working, and he is thus able to earn his regular pay, he is not entitled to an extra day's pay as gratuity pay. As Judge Whitaker observed in his dissent in *Kelly* v. *United States,* 119 C.Cls. 197, 215, the Resolution "is clear and unambiguous and must be taken to mean just what it says."[6] Since respondent

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[6] It is a basic rule of statutory interpretation that where the literal reading of a statute leads to no ambiguity nor to any futile or absurd results nor to any outcome plainly at variance with the policy of the legislation as a whole, the plain meaning of

was not prevented or relieved from working on the holidays involved here, but rather did work and was paid for those days, the Resolution does not entitle him to gratuity pay for those holidays.

This is not to say that the 1938 Resolution forbids employing agencies from paying gratuity compensation for holiday work, either in their discretion or pursuant to collective-bargaining contracts. The payment of gratuity pay on that basis has long been common practice, as the *Kelly* case itself illustrates, and the Government has never suggested that such pay contravenes the 1938 Resolution in any way. See 342 U. S. at 195. But, as already pointed out, the question here is not what Government agencies can do as a matter of discretion or contract. In the instant case, unless the respondent has a statutory right to gratuity pay for holiday work, he cannot recover.

II

The 1938 Resolution Repealed the 1885 Resolution to the Extent, if Any, That the Latter Established a Statutory Right to Gratuity Pay for Holiday Work.

In holding that, notwithstanding the provisions of the 1938 Resolution, respondent possessed a statutory right to gratuity pay for the holidays on which he performed work, the court below pointed to the prior administrative practice under the Joint Resolution of January 6, 1885, 23 Stat. 516, as amended, 5 U.S.C. (1934 ed.) 86 (*supra*, p. 3). This Resolution pro-

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the words should normally be followed. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543. "Where the intent is plain, nothing is left to construction." *United States* v. *Fisher*, 2 Cranch 358, 386. See also *Packard Co.* v. *National Labor Relations Board*, 330 U.S. 485, 492; *Osaka Shosen Line* v. *United States*, 300 U.S. 98.

vided that per diem employees of the Government were to be "allowed" certain specified holidays with "the same pay as on other days." In 1906, it was administratively held that, by implication, the 1885 Resolution entitled a per diem employee to double pay for holidays on which he was required to work. 13 Comp. Dec. 40.

While we think that the correctness of this administrative interpretation is subject to some doubt,[7] its validity for present purposes may be readily assumed; for, to the extent that the 1885 Resolution ever established a statutory right to double pay for work on holidays, it was repealed by the 1938 Resolution. This is shown by: (A) the language of the 1938 Resolution in its statutory context; (B) the legislative history of the 1938 Resolution; and (C) its contemporaneous construction by the Comptroller General and the Committee on Revision of the Laws of the House of Representatives.

A. *The language of the 1938 Resolution in its statutory context*

Section 2 of the 1938 Resolution provides that

> "The joint resolution of January 6, 1885 (U.S.C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict."

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[7] As will be seen below, the 1885 Resolution was enacted for the purpose of extending to all per diem employees of the Government the benefits conferred upon Government Printing Office employees by the Joint Resolution of April 16, 1880, 21 Stat. 304, the object of which was to insure that printers would not sustain a loss of income when the Government Printing Office was closed by reason of a holiday.

The 1938 Resolution thus expressly identifies the 1885 Resolution as "inconsistent or in conflict with the provisions of this Act" and expressly repeals the 1885 Resolution "to the extent of such inconsistency or conflict."

Riding hard on the latter phrase, respondent apparently contends that it operates as a savings clause to keep alive the pre-1938 administrative construction of the 1885 Resolution with respect to gratuity pay for work on holidays. The textual answer to this contention is two-fold.

First, it should be noted that the phrase "to the extent of such inconsistency or conflict" is directed equally (and perhaps even exclusively) to the phrase "all other laws inconsistent or in conflict with the provisions of this Act . . ." Certainly there is no basis for any argument that the phrase was particularly intended to limit the scope of the repeal of the 1885 Resolution. If anything, the contrary seems probable; from the face of the statute, one might well assume that the 1885 Resolution was wholly repealed and that the phrase "to the extent of such inconsistency or conflict" was added because of the general reference to "all other laws inconsistent or in conflict with the provisions of this Act." The legislative history of the provision (*infra*, pp. 17-24) confirms this view.

Second, in any event, the "inconsistency or conflict" between the two statutes with respect to the matter involved here—gratuity pay for holiday work—would appear clear. As already pointed out, the 1938 Resolution authorizes holiday gratuity pay on one condition and one condition only—namely, when per diem workers are prevented from working because of the holiday. Under the administrative interpretation of the 1885 Resolution, however, gratuity holiday pay was also al-

lowed even when per diem employees were not prevented from working. There surely is an "inconsistency", if not a "conflict", between two statutes, both expressly dealing with holiday gratuity pay for per diem employees, one of which requires gratuity pay where an employee actually works on a holiday and the other of which requires the gratuity only where the employee is prevented from working.

Moreover, even apart from the matter of gratuity pay for holiday work, it is plain that the body of the 1885 Resolution—"allowing" certain listed holidays with "the same pay as on other days"—was necessarily superseded by the 1938 Resolution, which has its own provision for holiday pay and contains its own list of holidays. That being so, the special administrative gloss relied upon by respondent could not have survived the elimination of the statutory basis for that gloss. When Congress repeals a statute, it is under no obligation to enumerate specifically the administrative rulings, based on the statute being repealed, that are thereby overruled. When the statute falls, so too do administrative rulings appended to and based on the statute. Such rulings do not exist "in the air," so to speak; they have no independent existence apart from the statute on which they rest.

B. *The legislative history of the 1938 Resolution*

1. *The legislative history of the 1938 Resolution indicates an intent to discontinue the differences with respect to holiday work between per diem and per annum employees.*

a. For many years, discrimination as to holiday pay existed between federal per annum employees and their per diem colleagues. Per annum employees, whose sal-

aries are traditionally regarded as payment for every calendar day of the year (whether a work day or non-work day), have always received their regular pay each period, irrespective of any holidays from which they are excused from working. On the other hand, prior to 1880, per diem and hourly employees were not paid for holidays on which no work was performed.

In the Joint Resolution of April 16, 1880, 21 Stat. 304, Congress addressed itself for the first time to the problem of the preferential treatment then accorded per annum employees with respect to holiday pay. The Resolution "allowed" per diem employees of the Government Printing Office specified legal holidays with pay and provided "that the said employees shall be paid for these holidays only when the employees of the other government departments shall be so paid." The avowed Congressional intent was to eliminate, as to those per diem employees, the existing inequality and to prevent the reduction of their regular pay checks because of holidays. As the House Committee on Printing put it in its Report on the bill (H. Rept. 585, 46th Cong., 2d Sess., p. 2):

> [Government Printing Office per diem employees] should be placed upon an equality [with respect to holidays] with the employes of all other government departments, who are allowed these holidays with pay. The committee see no good reason why the general rule should make an exception of this particular class * * *."[8]

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[8] The introduction of the 1880 Resolution was prompted by a determination of the Public Printer that he was not authorized to pay printers for New Year's Day, 1880, on which day the Government Printing Office was closed.

See also, to the same effect, 10 Cong. Rec. 708, 2116, 2170-2171. Cf. First Comp. Dec., 1 Lawrence 31.[9]

Five years later, Congress enacted the Joint Resolution of January 6, 1885, by which *all* per diem employees of the Government were also "allowed" specified legal holidays with the "same pay as on other days." According to its sponsor, Representative Hopkins, the thrust of the resolution was the same as that of the 1880 Resolution (16 Cong. Rec. 411):

> I am satisfied that if the resolution be read, no member will object to it. We are now ourselves about to take a two-weeks' holiday. This resolution simply provides that the employes of the navy-yard, Government Printing Office, Bureau of Engraving and Printing, and other per diem employes of the Government shall be entitled to four or five holidays during the year without losing their pay for those days.

The purpose of the 1885 Resolution was thus to place per diem employees on a par with per annum employees with regard to holiday pay.

Nevertheless, the unduly broad language of the Resolution was interpreted so as to accord preferential treatment to per diem employees in two major respects.

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[9] That Congress did not regard the 1880 Resolution as *requiring* the payment of double compensation for holiday work by Government Printing Office employees is further suggested by the Act of January 13, 1883, 22 Stat. 402, which provided in part that "for extra work, ordered in emergencies, and performed on Sundays or legal holidays, or between [midnight and 8 A.M.], the Public Printer is hereby authorized to pay such extra prices as the customs of the trade and the justice of the case may require." The legislative history of the Act reveals that it was designed to give the Public Printer discretionary authority to provide for extra compensation. 13 Cong. Rec. 6076.

First, per diem employees were allowed gratuity pay even when a holiday on which they did not work fell on Saturday or Sunday (a non-work day) so that they received an extra day's pay in addition to the full week's pay otherwise earned. Second, if they worked on a holiday, they received a day's gratuity pay in addition to their regular rate of pay for that day. 13 Comp. Dec. 40; 13 Comp. Gen. 295, 297; 18 Comp. Gen. 186, 187.[10] Per annum employees holding comparable positions received neither of these benefits. A day's pay was not added to their wages where a holiday occurred on a non-work day. Nor did they receive any extra gratuity pay for a holiday on which they worked.

On the other hand, per diem employees were limited to the holidays specified in the governing legislation, while their per annum co-workers had the advantage of additional holidays declared by Executive Order.

b. The immediate occasion for the enactment of the 1938 Resolution was Executive Order No. 7763 of December 6, 1937, 2 F.R. 2685, which closed the Government offices on December 24, 1937, and excused all employees from work on that day. See H. Rept. No. 2683, 75th Cong., 3d Sess. (hereinafter referred to as "Report"). While the Order did not entail a loss of wages for per annum employees, per diem employees could not be paid for that day since the existing legislation—

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[10] 13 Comp. Gen. 295 deals with Section 46 of the Act of January 12, 1895, 28 Stat. 601, which provided for eight legal holidays with pay for Government Printing Office employees. While its language differed in some respects from that of the 1880 Resolution, the pertinent committee reports point out that Section 46 of the 1895 Act (Section 47 of the bill) was substantially identical with the 1880 Resolution. See S. Rept. No. 18, 52d Cong., 1st Sess., p. 437; S. Rept. No. 574, 53d Cong., 2d Sess., p. 24; H. Rept. No. 7, 53d Cong., 1st Sess., pp. 7-8.

the 1885 and 1895 Acts—authorized a specified number of legal holidays with pay and the 24th of December was not among them. A Joint Resolution was therefore introduced in the House of Representatives authorizing the payment of compensation to the per diem employees who had lost wages as the result of the Executive Order. H. J. Res. 551, 75th Cong., 3d Sess.

The House Committee on Civil Service, to whom the Resolution had been referred, was advised by the Civil Service Commission that the question of holiday pay for per diem workers raised broader issues which should be resolved by general legislation rather than on a piecemeal basis (Report, p. 2). A detailed decision of the Comptroller General, which compared the effect of holidays on per diem workers and per annum workers, was included in the Committee's Report (17 Comp. Gen. 519; Report, pp. 3-5).

The Comptroller General's decision disclosed that, as noted above, in one aspect the status of per diem workers was inferior to that of per annum workers. While the latter did not suffer any loss of income as the result of holidays, whether declared by statute or administrative action, per diem workers were entitled to pay only if the holiday was specified by statute; there was no authority to pay them if Government offices were closed by Executive Order. On the other hand, the Comptroller General observed, per diem employees were entitled to two benefits denied to per annum employees. While the latter were not entitled to any additional compensation if required to work on a holiday, per diem workers received not only regular pay but double pay. And, if the holiday fell on a day on which the per diem worker would not have worked anyway

(*e.g.*, a Saturday or other nonworking day), he was still considered entitled to holiday pay. Thus, the Comptroller General pointed out:

> * * * even when any of such holidays falls on a nonworkday (such as a Saturday), such employees [*i.e.*, per diem employees] receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned,

and, additionally, per diem employees receive:

> double compensation for the [holi]day if work is performed thereon. [Report, p. 5.]

The draft resolution which was substituted for the measure originally introduced, and which was enacted as the 1938 Resolution, was carefully drawn, we think, to deal with these preferences and to equalize the treatment of per diem and per annum employees. And that it was so understood by Congress is manifest from the Committee's statement, immediately following the text of the Comptroller General's decision, that "Section 2 proposes to repeal the joint resolution of January 6, 1885 (U.S.C., title 5, sec. 86) * * *."[11] There is no suggestion in the Report that any portion of the 1885 Resolution—let alone an administrative practice based on it—was to survive the repeal. If anything, as far

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[11] It might be noted in this connection that Rule XIII 2a of the House of Representatives, in effect in the 75th Congress, stipulated that whenever a committee reported out a bill or joint resolution repealing or amending any statute or part thereof, it was to include in its report (1) the text of the statute or part thereof which was proposed to be repealed and (2) a comparative print of that part of the statute proposed to be amended.

While the committee report on the 1938 Resolution contained the text of the 1885 Resolution, it did not contain the comparative print which was required if the intent had been to amend rather than repeal the 1885 enactment.

as the Report is concerned, the 1885 Resolution was repealed in its entirety.

c. Less than a year after the enactment of the 1938 Resolution, a Joint Resolution was introduced in the House of Representatives which provided, *inter alia*, that "all Acts or parts of Acts repealed or modified by the [1938 Resolution] are hereby restored to full force and effect." H. J. Res. 303, 76th Cong., 1st Sess. (R. 25). In commenting upon this proposed legislation at the request of the House Committee on Civil Service, President Mitchell of the Civil Service Commission noted that the 1938 Resolution had been interpreted by the Comptroller General to mean that per diem employees who are required to work on a holiday receive the same pay as those who are excused from work (R. 25-26). Mr. Mitchell added that the Commission believed that favorable consideration should be given to the bill, but that (R. 26):

> The Bureau of the Budget has advised this office that the enactment of H. J. Res. 303 in its present form would not be in accord with the program of the President. The Bureau states, however, that there would be no objection to the enactment of the legislation which would permit the payment of compensation to the regular per diem employee when absent from duty for any cause on a holiday occurring on a tour of duty.

House Joint Resolution 303 was not enacted (R. 25). Nor were any of the several bills introduced in the 77th and 79th Congresses which also would have had the effect of requiring either gratuity pay or compensatory time off for work performed on holidays. H. R. 1386, 77th Cong., 1st Sess.; S. 1930, 77th Cong., 1st Sess.;

H. R. 6222, 77th Cong., 1st Sess.; S. 1679, 79th Cong., 2d Sess (R. 25-28). It is to be noted that both S. 1930 and H. R. 6222, in the 77th Congress, called for the amendment of the 1938 Resolution by the addition to Section 1 of a provision that:

> [W]henever any employee of the Federal Government who is employed at any Navy yard or naval station is required to work on any such holiday or day on which the departments and establishments of the Government are closed by Executive order, he shall be allowed compensatory time off on one other workday within the week following such holiday or, in lieu thereof, be paid one additional day's pay at his regular rate.

Thus, although specifically apprised of the administrative construction placed upon it by the agency charged with its enforcement, Congress repeatedly refused to alter or amend the 1938 Resolution. In these circumstances, and in the absence of compelling evidence to the contrary, it is to be presumed that Congress was "satisfied with the [decisions of the Comptroller General] and with the interpretation of its own meaning implicit in them." *Zellerbach Co.* v. *Helvering,* 293 U. S. 172, 178-179; *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345; *Massachusetts Mutual Life Insurance Co.* v. *United States,* 288 U. S. 269, 273; *Brooks* v. *DeWar,* 313 U. S. 354, 360.

2. *The Court of Claims' view of the purpose of the 1938 Resolution is erroneous.*

Despite the fact that, as seen above, the Committee Report on the 1938 Resolution expressly referred to *three* instances of inequality between the per diem and

the per annum employee, the court below held that the legislative purpose was solely to eliminate *two* of them. The court recognized that the Resolution was not limited to the grant to per diem employees of gratuity holiday pay for administrative holidays, for the court also recognized that the Resolution was intended to terminate one of the instances in which per diem employees were preferred over per annum employees, namely, the award of holiday pay for holidays occurring on non-working days. (R. 16.) At the same time, however, the court refused to ascribe to Congress an attempt to abolish the other preference accorded to the per diem employee, *i.e.*, the payment of double pay for work on holidays.

The court assigned three reasons for this selectivity in appraising the aims of the Resolution (R. 16-17): (a) if Congress had desired to dispense with the traditional practice of paying double pay for holiday work, it would have used express and specific words of repeal; (b) Congress could not have intended by the 1938 Resolution to "put the Government in an unfavorable position competitively at a time when the Government was in need of many new employees for the purpose of national defense"; and (c) Congress similarly could not have intended to create "the absurd situation wherein if a per diem employee were required to work on a holiday, he would be paid no more than his fellow worker who was not required to work." [12] We submit that this reasoning will not stand analysis.

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[12] As will be seen, the court below was also influenced by its erroneous belief that, under the Comptroller General's interpretation, an employee would receive less pay if he were required to work two hours on the holiday than if he were excused from working entirely. See pp. 32-33, *infra*.

a. In holding that Congress could not be presumed to have deprived per diem employees of the benefit of double pay for holidays without being specific about it, the court below stressed that this benefit was one of long standing. But the same observation could just as readily be made with respect to the grant of gratuity pay for holidays falling on non-working days, and the court below conceded that this benefit was eliminated by the 1938 Resolution. Both administrative practices developed under the 1885 Resolution and appear to be of equal antiquity;[13] both are mentioned in the Committee Report with equal emphasis; and neither is "expressly" rejected in the 1938 Resolution. In these circumstances, it could be argued with equal force under the court's theory that the Congressional intent had been limited to abolishing double pay for holiday work—the issue involved here—and had left intact holiday pay for holidays falling on non-working days.

Furthermore, as already pointed out, when Congress enacts superseding legislation, it is not obliged to undertake the virtually impossible task of explicitly touching upon all phases of the incidence and interpretation of the statute being displaced. It is surely enough that the very terms of the 1938 Resolution are at variance with the administrative interpretation given the 1885 Resolution and that, in addition, there was an express repeal of all conflicting or inconsistent statutes—with particular reference to the 1885 Resolution.

b. The argument of the court below, that it would be improper to impute to Congress an intent to place the Government at a competitive disadvantage in the acquisition of personnel needed for the purpose of na-

[13] Cf. *Kelly* v. *United States*, 119 C.Cls. at 203, fn. 3.

tional defense, is similarly without substance. Not only were the national defense efforts preceding this country's entry into World War II still not under way when the 1938 Resolution was enacted, but also Congress found it necessary during the period that the Resolution was under legislative consideration to appropriate $1,425,000,000 for the Works Progress Administration (52 Stat. 809) and $250,000,000 for Emergency Relief (52 Stat. 83) to alleviate the major national problem of unemployment. And the same Congress enacted the Fair Labor Standards Act of 1938, 52 Stat. 1060, one of the purposes of which was to reduce employment by reducing hours of work. *Overnight Transportation Co.* v. *Missel,* 316 U. S. 572, 577.

Moreover, it must be emphasized again, the question here is whether the 1938 Resolution *requires* an award of double pay, not whether it *permits* it. As this Court noted in *Kelly* (342 U. S. at 195), we have never suggested that the Resolution constitutes an absolute bar to premium pay for holiday work. Rather, our consistent position has been that the effect of the Resolution is to remit the entire matter of wages for holidays worked to the processes of collective bargaining and the discretion of the employing agencies, free of statutory compulsion. Thus, in the context of this case, had the Secretary of the Navy at some point determined that the exigencies of personnel procurement necessitated the payment of gratuity pay for holiday work, 34 U.S.C. 505 (*supra,* p. 3) would have provided him with sufficient authority to revise the Schedule of Wages accordingly. That no revision of this kind was made either prior to or during the period here relevant indicates that, in the Secretary's view, no such necessity existed. And that the Secretary's view was well

justified is reflected in part by the comparison made by the court below, in its findings, of employment in the Norfolk Shipyard with similar non-government employment in the same area. On the basis of that comparison (R. 34-35), there can be little doubt that, on balance, the terms and conditions of respondent's employment, formulated by the Secretary of the Navy and incorporated in the Schedule of Wages, were at least as favorable as those governing the respondent's counterpart in private industry.

c. As for the belief of the court below that it would be "absurd" to pay a per diem employee who is required to work on a holiday the same pay as is received by his fellow employee who is excused from working, there is absolutely nothing in the legislative history of the 1938 Resolution, or elsewhere, to suggest that the 75th Congress shared that belief. Indeed, all available indicia of the legislative view on the matter reflect the contrary.

Prior to the enactment of the 1938 Resolution, and for seven years thereafter, per annum employees received no additional compensation for work performed on holidays. As we have seen, this fact was brought to the attention of Congress in the Committee Report on the 1938 Resolution. It is reasonable to suppose that, had the Congressional feeling at the time been that it is inherently unjust to pay a per diem Government employee the same holiday pay irrespective of whether he is required to work or not, prompt corrective action would have been taken with regard to per annum employees in a similar situation. It of course can hardly be suggested that holiday work is any more attractive to an employee because his compensation is fixed on an annual, rather than on a monthly or daily, basis.

That in 1938 Congress did not subscribe to the view of the court below in this regard is further evidenced by several special statutes preceding the 1938 Resolution. These statutes authorized the grant of holiday gratuity pay to per diem employees for certain specified days—not encompassed by the 1885 Resolution, as amended—on which Government establishments generally were closed. Each in terms was limited in application to per diem employees who had been excused from work on the day in question; none of them authorized double pay for employees who had been required to work. The House Joint Resolution of March 29, 1937, 50 Stat. 56, which was enacted by the same Congress as enacted the 1938 Resolution, is typical:

> [T]he employees of the United States Government in the District of Columbia and the employees of the District of Columbia who come within the provisions of the Act approved June 18, 1888, and who under the provisions of said Act *did not work* on Wednesday, January 20, 1937, due to the closing of their places of employment on account of the holiday, shall be entitled to pay for said holiday [emphasis added].[14]

See also Joint Resolution of March 3, 1923, 42 Stat. 1444; Joint Resolution of June 27, 1930, 46 Stat. 826.

C. *Contemporaneous construction of the 1938 Resolution by the Comptroller General and by the House Committee on Revision of the Laws.*

The repeal of the 1885 Resolution, to the extent that it ever established a statutory right to double pay for

[14] The Act of June 18, 1888, 25 Stat. 185, made Inauguration Day a legal holiday within the District of Columbia.

holiday work, is also evidenced by the contemporaneous construction of the 1938 Resolution by the Comptroller General and the Committee on Revision of the Laws of the House of Representatives.

1. *The Comptroller General's interpretation*

The Comptroller General has consistently ruled that under the 1938 Resolution gratuity pay is not mandatory for those holidays on which an employee actually works. Shortly after its enactment, on July 6, 1938, he advised the Secretary of the Navy that the Resolution repealed the requirement that per diem employees be paid gratuity pay for holiday work and that "such employees are now entitled to pay for holidays only under and subject to the conditions of the [Resolution]." 18 Comp. Gen. 10, 13. Identical interpretations of the Resolution were given to the Secretary of War on August 19, 1938 (18 Comp. Gen. 186), the Public Printer on August 23, 1938 (18 Comp. Gen. 191), and to the Governor of the Panama Canal on August 29, 1938 (18 Comp. Gen. 206).[15]

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[15] In his response to the Secretary of War on August 19, 1938, the Comptroller General elaborated upon the interpretation of the 1938 Resolution contained in his communication to the Secretary of the Navy [18 Comp. Gen. at 188]:

"Hence regular per diem, per hour, and piece-work employees are entitled to their regular pay for holidays on which no work is performed only if and when they 'are relieved or prevented from working solely because of the occurrence of' the holiday. If they are relieved or prevented from working on the holiday for any reason other than the occurrence of the holiday, such as when the holiday occurs on a non-work day, or within a period of furlough or leave of absence, no pay for the holiday as such is authorized. If such employees are required to work on a holiday occurring within their regular tour of duty, only 1 day's pay is authorized —payment of gratuity holiday pay in addition being no longer authorized. If the holiday occurs on a day outside the regular tour of duty of 40 hours per week and work is required on the holi-

Upon receipt of the Comptroller General's decision, the Secretary of the Navy, by circular letter of August 17, 1938, amended the then existing Schedule of Wages. The Secretary directed the deletion of those provisions of the Schedule which stipulated that gratuity pay was to be allowed (1) for work on legal holidays and (2) for legal holidays not within the employee's regular tour of duty and upon which no work was performed (R. 22). The substitution of the following was directed (R. 24):

> For work on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are closed by Executive Order, within the employee's regular tour of duty, *the schedule rate of pay shall be allowed.*
>
> Whenever an employee is relieved or prevented from working solely because of the occurrence of any day declared a holiday by Federal statute or Executive Order, or any day on which the departments and establishments of the Government are closed by Executive Order, he shall receive the same pay for such days as for other days on which an ordinary day's work is performed.
>
> For work on any day declared a holiday by Federal statute or Executive Order or any day on which the departments and establishments of the Government are closed by Executive Order, not exceeding eight hours, when not a part of the employee's regular tour of duty, performed under

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day, the employee is not entitled to 2 days' pay, one for working and one for the holiday, but may be entitled to overtime pay for the day under administrative regulations at a rate not less than one and one-half times their regular pay. * * *"

proper authority, the schedule rate of pay plus 50% additional shall be allowed [emphasis added].

* * * * *

This amendment was reflected in subsequent Schedules of Wages, including that which governed respondent's employment during the time here involved,[15a] and in Sections 250.7-12 and 250.7-13 of the Navy Civilian Personnel Instructions, issued April 13, 1945 (R. 24).

This contemporaneous interpretation of the 1938 Resolution by the legislative agency [16] charged with the supervision of the payment of salaries to all governmental employees [17]—an interpretation, moreover, immediately put into effect by the Executive Departments—is entitled to great weight and is not to be overturned unless clearly erroneous. *Inland Waterways Corp.* v. *Young,* 309 U.S. 517; *United States* v. *Jackson,* 280 U.S. 183, 193; *United States* v. *Citizens Loan & Trust Co.,* 316 U.S. 209, 214; *United States* v. *Madigan,* 300 U.S. 500, 506; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315; *United States* v. *American Trucking Associations, Inc.,* 310 U.S. 534, 549; *Adams* v. *United States,* 319 U.S. 312, 314-315; *Edward's Lessee* v. *Darby,* 12 Wheat. 207, 210.

In this connection, we respectfully note that the observation made by this Court in the *Kelly* case (342

[15a] Schedule of Wages, revised to October 16, 1944, provided in part (paragraph 5(g), p. 21):

"For work on any day declared a holiday by Federal statute or Executive Order, or on any closed day, when within the employee's regular tour of duty, the same rate of pay is allowed as for any other day within the regular tour of duty."

[16] The General Accounting Office is an agency in the legislative branch of the Government. United States Government Organization Manual 1951-52, p. 34.

[17] Act of July 31, 1894, Sec. 7, 28 Stat. 206, as amended, 31 U.S.C. (1946 ed.) 72.

U.S. at 196 (footnote 6) and repeated in the decision below (R. 16)—suggesting that the interpretation leads to the absurd result of paying an employee less for working than for not working—does not actually accord with the construction employed in practice. Under the Comptroller General's view, an employee who works for part of a holiday—a day for which gratuity pay would be allowed if he did not work at all—receives a full day's pay, consisting of pay for the number of hours worked plus gratuity pay for the balance of the holiday. See 24 Comp. Gen. 843; S. Rept. 1470, 83d Cong., 2d Sess.[18] Thus, per diem employees such as respondent occupied no different position from that of per annum employees, whose pay for holidays (prior to the passage of the Federal Employees' Pay Act of 1945, *infra*, pp. 36-37) was not affected by whether they worked the entire holiday, worked only a part of it, or were excused from working entirely.

2. *The legislative interpretation*

The 1940, 1946, and 1952 editions of the United States Code, prepared under the supervision of Committees of the House of Representatives,[19] have similarly treated the 1938 Resolution as repealing the 1885 Res-

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[18] S. Rept. 1470 was submitted in connection with the Act of June 14, 1954, 68 Stat. 249, which amended the Joint Resolution of 1938 to include within its scope days upon which per diem employees "are relieved or prevented from working by administrative order issued under such regulations as may be promulgated by the President." See n. 1, *supra*, p. 2.

[19] The 1940 and 1946 editions were prepared under the supervision of the Committee on the Revision of the Laws. Act of May 29, 1928, § 2, 45 Stat. 1007, as amended, 1 U.S.C. (1940 ed.) 52 (d). In 1947, this function was transferred to the Committee on the Judiciary. Act of July 30, 1947, § 1, 61 Stat. 633, 1 U.S.C. 202.

olution to the extent that the latter required payment of gratuity pay to those per diem employees who worked on holidays. In the 1934 edition of the Code, the 1885 Resolution was codified in 5 U.S.C. 86. In the 1940 and 1946 editions, 5 U.S.C. 86 is followed by a notation reading in pertinent part:

> As originally enacted this section also contained a provision relating to pay of employees for work on holidays. Said provision was repealed by act June 29, 1938, ch. 818, § 2, 52 Stat. 1247 * * *.

Accordingly, in those editions the Section omits the words "and shall receive the same pay as on other days" which originally appeared in the 1885 Resolution. And, in the 1952 edition, the text of the 1885 Resolution does not appear at all:

> § 86. Repealed. June 29, 1938, ch. 818, § 2, 52 Stat. 1247.
>
> Section, acts Jan. 6, 1885, No. 5, 23 Stat. 516; Feb. 23, 1887, No. 6, 24 Stat. 644; June 29, 1938, ch. 818, § 2, 52 Stat. 1247, related to holidays for per diem employees, and is now covered by section 86a of this title.[20]

While the United States Code is only *prima facie* evidence of the law (1 U.S.C. (1946 ed., Supp. IV) 204(a)), the construction placed by a Committee of the House of Representatives on a recent enactment is not lightly to be disregarded. This is especially true where, as here, the construction is a reasonable one and there is no inconsistency between the Statutes at Large and the Code. Cf. *Stephan* v. *United States,* 319 U. S.

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[20] 5 U.S.C. 86a is the 1938 Resolution. The act of February 23, 1887, also referred to in the note in the 1952 edition of the Code, amended the 1885 Resolution to add Memorial Day to the list of holidays covered by the Resolution.

423, 426; *Hoague-Sprague Corp.* v. *Frank C. Meyer Co.*, 31 F. 2d 583, 586 (E.D. N.Y.); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796, 801-802 (S.D. Cal.).

The short of the matter is that, viewed from the standpoint of its terms, its purpose, and its consistent administrative and legislative interpretation, the 1938 Resolution (1) does not require the award of gratuity pay for work performed on holidays and (2) repeals the 1885 Resolution to the extent, if any, that the latter required such pay. The court below thus erred in granting respondent recovery of double pay as a matter of statutory right.

III

The Policy of Non-Observance of Wartime Holidays Supports Denial of Gratuity Pay to Per Diem Employees for Work on Those Holidays.

In normal times there is ample justification for paying an employee bonus or premium pay when he works on a holiday. Holiday work is more onerous and burdensome than work on a regular week day. A holiday is a day for religious, patriotic, or recreational pursuits. Assignment to holiday work involves on the part of the employee a departure from his normal way of living. These considerations justify payment of premium pay to those federal employees who are required to work when other federal employees are excused from work and allowed to enjoy an uninterrupted holiday without loss of pay.

The court below, however, completely overlooked the fact that during wartime none of these considerations is pertinent. Perhaps one of the least inconveniences in World War II was that suffered by civilian employees who had to give up their holidays so as to attain the

maximum output needed for waging a successful war. The 1943 Presidential directives, declaring the overriding wartime need, required all civilian Government employees to work on all holidays throughout the war with the exception of Christmas (*supra,* pp. 4-5). The normal peacetime holidays were thus converted into regular work days and employees generally were required to work on those days "without additional compensation" (*supra,* p. 5).

The policy of allowing gratuity pay for holiday work in peacetime (where such work is unusual) and of prohibiting it in wartime (when holidays are regular work days) is reflected in the Federal Employees Pay Act of 1945. That Act, which became law after VE Day but before VJ Day, provided that its provision for premium pay for holiday work was not to take effect until "cessation of hostilities in the present war." 59 Stat. 298, Sec. 302, 5 U.S.C. 922. Postponement of the effective date of the premium-pay provision was necessary because of the express Congressional recognition of the policy that during World War II, "all holidays, except Christmas, are regular workdays." H. Rep. No. 726, 79th Cong., 1st Sess., p. 13.[21] Since the holidays involved in the instant litigation were regular wartime work days (*supra,* pp. 4-5), it is apparent that the decision below allowing gratuity pay for holiday work conflicts with well-established policy allowing such pay only for peacetime holidays.[22] Pursuant to that policy, per annum employees worked on holidays throughout

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[21] This report accompanied H. R. 3393, which became the Federal Employees' Pay Act of 1945.

[22] Section 302 of the Federal Pay Act of 1945 does not apply to ungraded employees such as Bergh (*i.e.*, employees whose rate of pay is fixed by administrative action rather than by statute). To correct the resulting inequity, the Secretary of the Navy and the

World War II without receiving any additional compensation. Cf. *Di Benedetto* v. *United States,* 108 C. Cls. 18, certiorari denied, 332 U. S. 763. Nothing in the terms or history of federal pay legislation justifies the discrimination sanctioned by the court below in favor of per diem employees. And, in any event, the policy itself is a pertinent consideration in resolving the statutory question presented here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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AUGUST, 1956.

Secretary of War jointly requested a ruling from the Comptroller General as to whether they administratively could authorize premium pay for holiday work performed by ungraded employees. On February 7, 1946, the Comptroller General responded in the affirmative (25 Comp. Gen. 584), relying in large measure upon the "present legislative policy" with regard to peacetime holiday pay reflected by the 1945 Act. Twelve days later, the Secretary of the Navy issued an order directing that all ungraded employees required to work on a holiday within their normal tour of duty be paid for such work at the rate of 1½ times their scheduled rate of pay. And when, by Section 11 of the Act of May 24, 1946, 60 Stat. 218, Congress amended the 1945 Act to increase the pay for holidays worked by graded employees to two times their regular pay, the Department of the Navy adjusted the holiday pay of its ungraded employees accordingly. See, *e.g.*, Navy Civilian Personnel Instruction 85.6-3, issued February 17, 1955.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 17

THE UNITED STATES, PETITIONER,

v.

ALFRED C. BERGH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENTS, BERGH, et al.

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No. 17

THE UNITED STATES, PETITIONER,

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ALFRED C. BERGH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENTS, BERGH, et al.

QUESTION PRESENTED

Whether the Joint Resolution of June 29, 1938 (52 Stat. 1426, 5 U.S.C. 86(a) operates to repeal the Joint Resolution of January 6, 1885 (23 Stat. 516, 5 U.S.C. 86), to the extent that the latter Resolution requires the payment of a so-called holiday gratuity allowance to federal per diem employees in addition to their ordinary compensation for work performed on a holiday occurring on a regular work day.

STATEMENT OF THE CASE

The Statement contained in the Brief for the Petitioner (p. 4) is adequate for purposes of this review.

SUMMARY OF ARGUMENT

The precise issue in this case, as indicated by the "Question Presented" set forth above, has been twice submitted to the United States Court of Claims and has twice been adjudicated in respondents' favor. The reasoning which has moved that Court to so conclude is as follows:

I. The 1885 Resolution, by its language and by over fifty years of administrative application, operates to provide a gratuity pay allowance to federal per diem employees for certain indicated holidays, and this allowance is payable whether or not work happened to be performed on that holiday. For work actually performed on a holiday the per diem employees were paid their regular compensation, and, in addition, received the gratuity holiday allowance. Thus, the obligation to pay the holiday gratuity has no relation to whether work was or was not performed.

II. The Government contends that the 1938 Resolution operates to repeal all prior holiday pay statutes, including the 1885 Resolution under which respondents make claim, so that at present a holiday gratuity is payable only in the single instance of where the employee has lost his day's pay because the occurrence of the holiday in itself prevented him from working. Respondents' answer is that there is nothing in either the language or the legislative history of the 1938 Resolution to warrant such a reading of the Resolution or such a conclusion as to its purpose. On its face the Resolution merely operates to amend the 1885 law in two narrow respects: (1) It permits holiday pay for holidays on which no work is performed, but only if employees were prevented from working because of the occurrence of the holiday itself, and (2) it permits holiday pay for holidays that have been administratively decreed in addition to holidays that have been statutorily decreed. That Resolution is completely silent on the subject of gratuity pay for holidays on which work was in fact performed, and this Court has already so construed the 1938 Resolution in *United States* v. *Kelly*,

342 U.S. 193. So read (and there is nothing tortuous in such a reading which follows from the literal language of the Resolution), there is no inconsistency with the 1885 Resolution insofar as the 1885 Resolution grants holiday pay allowances in addition to regular compensation for holidays actually worked where such holidays occur on a regular working day.

Furthermore, the 1938 Resolution does not contain any language which repeals the 1885 Resolution in so many words, as might be expected if the contention of petitioner was correct. On the contrary, in the 1938 Resolution it is expressly stated that the 1885 Resolution is repealed *only* to the extent of any inconsistency.

Finally, the construction of the 1938 Resolution contended for by petitioner will produce extremely absurd and inequitable results, one of which has already been noted by this Court in the *Kelly* case, and another of which is that the per diem employee who refrained from working on a holiday occurring on a regular work day would receive the same pay as the per diem employee who worked on that day.

III. The legislative history of the 1938 Resolution shows no intention whatsoever to repeal the 1885 Resolution in its entirety or to touch in any way upon the long-standing practice of paying a gratuity allowance in addition to the regular compensation on holidays actually worked. That history shows conclusively that the Congress was concerned with only two problems, namely, the problem of paying gratuity pay on holidays even though the employee would not otherwise have worked, and the problem of equating Presidentially as distinguished from statutorily-declared holidays. Furthermore, the contention of petitioner that Congress intended the 1938 Resolution to equalize the holiday pay status of per diem and per annum employees in all respects finds no support in the legislative history and is entirely without substance on the merits in view of the

various other differentials between per annum and per diem employees in this respect that the 1938 Resolution leaves untouched.

IV. Petitioner's argument that the wartime policy of requiring employees to work on days normally observed as holidays deprived per diem employees of the right to gratuity pay is both without merit and irrelevant to the issue in this case. The wartime policy upon which petitioner relies was promulgated by memoranda sent to heads of the executive departments by the Administrative Assistant to the President. Clearly, this policy, effectuated in 1943, has no significance in determining what Congress intended when it enacted the 1938 Resolution five years earlier, during a period of peace. In any event, the memoranda did not affect the right of per diem employees to gratuity pay provided by statute. The memoranda merely informed the heads of executive departments that no holidays, with the exception of Christmas, would be declared by executive action during the war period. As a result there were no holidays, with the exception of Christmas, for per annum employees because their holidays are declared by executive action. However, the memoranda could not affect the rights of per diem employees because their holidays as well as the gratuity pay are allowed by statute.

ARGUMENT

The Government argues in substance that the Congressional Joint Resolution of 1938 operates by its express terms, and as further demonstrated by its legislative history, to repeal in its entirety the Joint Resolution of 1885 which granted federal per diem employees certain gratuity pay allowances for holidays and under which respondents herein make claim. The Government adds as further grounds for rejection of respondents' claims the fact that the claims were made in respect to holidays worked during the period of World War II when Government employees were required by executive decree to work on all holidays

except Christmas. The United States Court of Claims carefully considered and rejected these precise contentions of petitioner not only once but in two separate decisions, in the latter of which the Chief Justice joined although he had dissented from the first.[1]

In determining the error in petitioner's position, it is necessary to bear in mind the exact question which lies at the heart of this case and which has been resolved by the Court below adversely to the Government. That question is not, as framed by the petitioner herein (Brief, p. 2), whether federal per diem employees are entitled to an extra day's pay for work on holidays during the period of World War II when such holidays were made regular working days by administrative decree. Rather, the question is whether the Congressional Joint Resolution of 1938, enacted almost five years prior to World War II and upon which the Government relies exclusively as statutory reason for denial of such extra day's pay,[2] has as its purpose and effect the repeal of existing statutory law (the Joint Resolution of 1885) which had been consistently construed and applied to require the payment of holiday pay allowances in addition to their regular compensation to per diem employees who were required to work on holidays. Talk, therefore, of wartime requirements for work on holidays is entirely immaterial, and the Government's stressing of the wartime factor is, as will be indicated later in this brief, entirely misplaced.

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[1] *Kelly* v. *United States*, 119 C. Cls. 197; *Bergh* v. *United States*, C. Cls. —, 132 F. Sup. 462, and reproduced herein at R-13.

[2] At no time in its arguments before the Court of Claims, *i.e.*, either in the *Kelly* case or in the present one, did the Government contend that the May 12, 1943, directive of the President, requiring holiday work during the war period, operated in itself to repeal the 1885 Joint Resolution. It is fundamental that the Executive may not overrule the express or implied will of Congress respecting the status, tenure or compensation of federal employees, at least those on the employment level of the claimants herein. *Roth* v. *Brownell*, 215 F. 2d 500; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579.

I.

THE JOINT RESOLUTION OF 1885 GRANTED GRATUITY PAY ALLOWANCES TO FEDERAL PER DIEM EMPLOYEES FOR HOLIDAYS, WHETHER WORKED OR NOT, IN ADDITION TO REGULAR COMPENSATION FOR HOLIDAYS ACTUALLY WORKED.

It is important to note that the 1885 Resolution not only "allowed" certain holidays but also provided for the payment of gratuity pay to federal per diem employees on those days regardless of whether they worked or did not work. It did not attempt to prescribe the rate of pay for holiday work; it merely declared that on the prescribed holidays a gratuity allowance equal to a regular day's compensation would be forthcoming.

The 1885 Resolution reads as follows:

> ". . . the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the day of each year which is celebrated as 'Memorial' or 'Decoration Day', the fourth of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days."

Entirely apart from the foregoing provisions, if a per diem employee worked on a holiday, he would, of course, receive his regular compensation for working at whatever rate might be called for under his employment relationship with the Government. Thus in the present case the respondents were paid their regular day's wages for their work on the holidays herein involved and make no claim for that; they ask only for the gratuity allowance which is made payable generally on holidays to all per diem workers under the provisions of the Joint Resolution of 1885.

This Court, when it had occasion to consider in the *Kelly* case [3] the effect of a similar 1895 Resolution relating to employees of the Government Printing Office found that law to be "consistently administered as providing for gratuity pay in addition to regular compensation if the employees worked on a holiday" (342 U.S. at 194).[4] The construction given the 1885 Resolution by the Comptroller General of the Treasury (13 Comp. Dec. 40) is further illuminating. He held in respect to the 1885 and 1895 Acts as follows:

> "These statutes allow or grant to certain employees of the Government the holidays specified with regular pay. The pay is not for service performed or labor performed, but is a gratuity. It is not intended that the employees shall perform any service for the pay given them by these joint resolutions. The pay has no relation to work. If the public interests require that these employees shall work on the stated holidays and they do work, then if they receive only the pay given by the joint resolutions they have not been paid for their labor, but have received merely the gratuity which they were entitled to without working. They are, therefore, entitled to pay at the rate of their regular per diem pay for work on the holidays in addition to the gratuity pay given them by the statutes referred to; that is, to double the amount of their regular per diem pay when they work all day."

The reasoning of the Comptroller General's decision which refused to stultify the grant of Congress was confirmed in *Emmett L. Adams* v. *The United States,* 42 C. Cls. 191, 212 (1907). In that case the court pointed out that "when the statute declares certain days to be holidays and

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[3] *United States* v. *Kelly,* 342 U.S. 193.

[4] Although this Court made such determination in respect to the Act of 1895 (28 Stat. 601, 607, par. 46), that Act, relating to Government Printing Office Employees, was the exact counterpart of the Joint Resolution of 1938, and this Court cited opinions of the Comptroller of the Treasury construing the 1885 Resolution to grant gratuity pay. (8 Comp. Dec. 322 (1901); 13 Comp. Dec. 40 (1906); 3 Comp. Gen. 411 (1924).)

provides that certain employees shall receive the same pay as on other days, they are thereby exempt from work, with pay, on such days." Thereupon, the court concluded that if such employees were required to work on such days, they would be entitled to their regular rate of pay in addition to the gratuity pay provided by statute.

The reason which presumably induced Congress and the Government to grant gratuity pay to per diem employees on holidays when they did not work is that annually-paid employees continued to receive their compensation for holidays on which they did not work; the reasons which induced Congress and the Government to pay per diem employees this gratuity in addition to their regular compensation for holidays on which they did work are well set forth by petitioner in its brief (p. 35) where it is stated:

> "Holiday work is more onerous and burdensome than work on a regular week day. A holiday is a day for religious, patriotic, or recreational pursuits. Assignment to holiday work involves on the part of the employee a departure from the normal way of living. These considerations justify payment of premium pay to those Federal employees who are required to work when other Federal employees are excused from work and allowd to enjoy an uninterrupted holiday without loss of pay."

The basic question in this case is whether in 1938, when Congress passed its Joint Resolution relating to holiday allowances, it intended to repudiate the above considerations and to repeal the 1885 Resolution as well as the more than fifty years practice of paying per diem employees who worked on holidays the gratuity allowance in addition to their regular compensation when such employees worked on a holiday which was also a regular working day. We turn now to that question.

II.

THE 1938 RESOLUTION DOES NOT OPERATE, EITHER UNDER ITS TERMS OR BY REASON OF ITS LEGISLATIVE HISTORY, TO REPEAL THE 1885 RESOLUTION TO THE EXTENT THAT THAT RESOLUTION AUTHORIZED GRATUITY PAY IN ADDITION TO REGULAR COMPENSATION FOR WORK PERFORMED ON HOLDAYS OCCURRING ON A REGULAR WORKING DAY, NOR IS IT INCONSISTENT THEREWITH.

A. READ LITERALLY, OR BY ITS TERMS, THE 1938 RESOLUTION DOES NOT REPEAL THE 1885 RESOLUTION.

The 1938 Resolution reads as follows:

> "Whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive Order, or any other day on which the departments and establishments of the Government are closed by Executive Order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.
>
> "Sec. 2. The joint resolution of January 6, 1885, U.S.C., title 5, sec. 86, and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict." (c. 818, 52 Stat. 1246, 5 U.S.C. § 86a.)

The 1938 Resolution, read literally, operates simply to amend the 1885 law in two respects: (1) It permits holiday pay for holidays on which no work is performed, but only if employees were prevented from working because of the occurrence of the holiday itself, and (2) it permits holiday pay for holidays that have been administratively decreed in addition to holidays that have been statutorily decreed.

Thus, there is nothing in the literal language of the 1938 enactment which is in any way inconsistent with the Act of 1885 to the extent that the Act of 1885 requires premium pay for holidays occurring on a regular work day and on which work is actually performed, and, of course, there is nothing in the language of the 1938 Resolution either directly or indirectly repealing such requirement for premium pay for holidays actually worked. Of even greater importance is the fact that the 1885 Resolution nowhere speaks of what result should obtain when services are in fact performed on a holiday; as expressly found by this Court in the *Kelly* case (342 U.S. at 194), the 1938 Resolution is "silent on the subject of gratuity pay for holidays on which work was performed."

Even though the 1938 Resolution deals only with the subject of holidays on which no work is performed, from this fact the petitioner would draw the conclusion that the Resolution intended to deal with the whole subject of holiday pay and to limit such pay to the one instance specified, namely, a holiday on which no work is performed. Aside from the entire absence of any indication of such an intent in the legislative history of the 1938 Resolution (see *infra*, p. 15), the principal difficulty with such a reading of the 1938 Resolution is that, in arriving at the conclusion that Congress was eliminating all gratuity pay except in the one instance set forth in the Resolution, petitioner somehow incorporates the phrase "shall make gratuity payments *only*" in that single stated instance. That phrase or words of equivalent substance or effect are not, of course, included in the Resolution, although Congress could easily have done so had it intended the very limited effect contended for by the Government. Surely, no Congress, presumably expert in the art of drawing statutes, would broadly dispose of the very important subject of gratuity pay for holidays actually worked by mentioning in the statutory language purportedly covering the whole subject of gratuity pay only the very narrow situation where an employee was prevented

from performing his regular work because of the occurrence of a holiday. Surely, if Congress had intended to treat other than the very narrow subject of gratuity pay in instances where no work was performed because of a holiday, it would have employed language of a more appropriate nature. On the other hand, in dealing only with the limited subject of compensation for being prevented from working because of a holiday occurring on a working day, leaving untouched the other aspects of gratuity pay, Congress did use language which was both apt and precise.

The fallacy of the Government's assumption that the 1938 Resolution repeals not only the 1885 statute but all prior holiday statutes in their entirety is clearly demonstrated in *John Di Benedetto* v. *United States,* 108 C. Cls. 18, 24, 25 (1947), cert. denied, 332 U.S. 763, which expressly recognizes that the 1885 Resolution was not superseded, but only modified by the 1938 Resolution. That decision establishes that the 1938 Resolution merely refers to statutory holidays, but does not in fact allow such holidays. Other holiday statutes *in pari materia,* such as the 1885 Resolution and the 1895 Act, *allow* the statutory holidays referred to in the 1938 Resolution.

Petitioner contends that since the 1938 Resolution is "clear and unambiguous" its meaning must be found only in the literal words of the Resolution. Read literally, the 1938 Resolution clearly applies only to the situation in which employees do not work on a holiday. As we have seen, and as this Court has found in *Kelly,* it makes no reference to gratuity pay when employees are required to work on a holiday. However, the 1885 Resolution provides gratuity pay to employees who are required to work on a holiday. Thus, if the 1938 Resolution is read literally, and "taken to mean just what it says", as Petitioner contends, it clearly has no application to the issue involved herein, and the 1885 Resolution governs the right of Respondents in this case. We repeat, if Congress had had any intention

whatsoever of terminating the long-standing practice of paying premium pay for holidays worked, it could easily have done so by express language directed to that end. That it did not use such language is significant.

Since the 1938 Resolution deals by its express terms only with the subject of pay when per diem employees are *prevented* from working because of the occurrence of a holiday, there is no call to broaden its scope to include by implication a direct prohibition against payment of gratuity pay in addition to regular pay when a per diem employee performs work on a regular work day. It has been many times determined by this Court that repeals by implication are not favored. See *Federal Trade Commission* v. *A.P.W. Paper Co.*, 338 U.S. 193; the general rule is that Congress will not be presumed to intend overturning long-established legal principles unless such intention is clearly evidenced by express declaration or necessary implication *Koenigsberger* v. *Richmond Silver Mining Co.*, 158 U.S. 41; *Scarborough* v. *Atlantic Coast Line*, 178 F. 2d 253. See also *Wisconsin* v. *Illinois*, 278 U.S. 367; *United States* v. *Johnson*, 173 U.S. 363; *First National Bank* v. *Missouri ex rel Barrett*, 263 U.S. 640; *Merritt* v. *Cameron*, 137 U.S. 542; *Dismuke* v. *United States*, 297 U.S. 167; *United States* v. *Citizens Loan & Trust Co.*, 316 U.S. 209. To the extent that the 1938 Resolution is not inconsistent with holiday statutes *in pari materia*, it must be presumed that it was enacted in accord with the legislative policy embodied in the 1885 Resolution and other holiday pay statutes, and effect must be given to all such statutes. *Sanford* v. *Commissioner of Internal Revenue*, 308 U.S. 39, 44 (1939). *Cf. Layne-Western Co.* v. *Buchanan County, Mo.*, 85 F. 2d 343, 346 (C.A. 8th, 1936).

B. THE REPEALER CLAUSE OF THE 1938 RESOLUTION DOES NOT REPEAL THE 1885 RESOLUTION IN ITS ENTIRETY, BUT ONLY TO THE EXTENT ~~LESS ENTITLED TO GRATUITY PAY.~~ of any inconsistency.

Nor can the Government take comfort in the repealer

clause of the 1938 Resolution (Sec. 2) which states that "The joint resolution of January 6, 1885 (I.S.C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict." First of all, it is to be noted that Section 2 repeals the Resolution of 1885 *only* to the extent of any inconsistency. Thus the general repeal clause of the 1938 Resolution repealed nothing that would not have been repealed without it. *Hoague-Sprague Corporation* v. *Frank C. Meyer Co., Inc.*, 31 F. 2d 583, 585, 586 (E.D. N.Y. 1929).

We have seen that the two statutes are not by their terms inconsistent or in conflict. If, as contended for by the Government in its brief (p. 16), it was the intent of Congress that the phrase in Section 2 "to the extent of such inconsistency or conflict" was not to be applicable to the language "the Joint Resolution of January 6, 1885" therein but rather only to the balance of Section 2, surely Congress would have worded Section 2 more appropriately, as, for instance, by expressly stating that the Joint Resolution was repealed in its entirety, but that all other holiday pay laws were repealed only to the extent of any inconsistency. See, again, the decision of the Court of Claims in the *Di Benedetto* case, *supra*.

C. EVEN ASSUMING THAT THE RIGHT OF PER DIEM EMPLOYEES TO GRATUITY PAY MUST BE DETERMINED SOLELY BY REFERENCE TO THE 1938 RESOLUTION, AS PETITIONER CONTENDS, SUCH EMPLOYEES REQUIRED TO WORK ON STATUTORY HOLIDAYS ARE NEVERTHELESS ENTITLED TO GRATUITY PAY.

Normally, a holiday is considered a "day of exemption from labor or work", or as a "day fixed by law for the suspension of business in whole or in part". (Webster's New International Dictionary, Second Ed. Unabridged, 1948.) It is contemplated that the departments and agencies of the Government will be closed on such days. (See Ismar Baruch, Federal Holiday Pay Policies, Vol. 8, *Personnel*

Administration, p. 15.) Under the 1885 Resolution which "allows" the holidays referred to in the 1938 Resolution, employees are both "relieved" and "prevented" from working. This principle was established fifty years ago by the Comptroller General of the Treasury. In his 1901 decision (8 Comp. Gen. Treas. 322) he stated:

> "The act of 1895, *supra,* granting certain holidays to the employees of your office with pay does not confer any discretion upon you. The act is self-executing. When one of those holidays arrives, it is only a question as to whether a person is an employee of your office on that date. If he is, the law does the rest. It grants him a holiday with pay. *It is not within your power to compel him to work on such a day unless such work is a matter of public necessity, nor is it within his right to perform his ordinary duties, unless such are works of necessity on that day, and claim pay for such ordinary day's work. . . .*" (Emphasis supplied.)

Under the 1885 Resolution, if an employee were required by the necessities of the situation to work on a holiday, he obviously was not "allowed" the holiday. Nevertheless, he received his gratuity pay in addition to his pay for hours of actual work. Because the term "relieved or prevented" merely describes the consequences of being "allowed" a holiday, it is apparent that the 1938 Resolution is consistent with the 1885 Resolution with respect to payment of gratuity pay when wage rate employees are required to work on a statutory holiday. Thus, under the 1938 Resolution, if an employee is not "relieved or prevented from working", on a holiday which is allowed him, because the necessities of the situation require him to work on that day, he is similarly entitled to his gratuity pay. In the complete absence of any evidence of a contrary legislative intent it should be presumed that Congress intended to continue this traditional construction of provisions of prior holiday statutes. *United States* v. *Missouri Pac. R. Co.,* 278 U.S. 269; *United States* v. *Jackson,* 280 U.S. 183.

D. THE LEGISLATIVE HISTORY OF THE 1938 RESOLUTION INDICATES NO INTENT TO REPEAL THE 1885 RESOLUTION IN ITS ENTIRETY, BUT ONLY TO QUALIFY THE GENERAL BODY OF FEDERAL HOLIDAY PAY STATUTES IN TWO NARROW RESPECTS, BOTH OF WHICH ARE UNRELATED TO THE PAYMENT OF GRATUITY PAY FOR WORK PERFORMED ON HOLIDAYS OCCURRING ON REGULAR WORKING DAYS.

The legislative history of the Joint Resolution of 1938 is completely lacking in any indication whatsoever of an intent to abolish the 50-year practice of paying a gratuity allowance for holidays worked, nor indeed does that legislative history reveal even the suggestion of a complaint that it was inequitable or uneconomical or otherwise improper for the federal government to pay its per diem employees premium pay when work was performed on holidays.[5]

Far from the legislative history revealing any intent to repeal the 1885 enactment, that history reveals conclusively that Congress, in passing the 1938 Joint Resolution earlier in this brief, was concerned *solely* with the two problems mentioned *supra* on p. 9, namely, the problem of giving the same status for gratuity pay purposes to holidays established by executive order as to holidays established by statute, and the problem of eliminating a situation under which a per diem employee, although not called to work, re-

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[5] It is significant that at the time the 1938 Resolution was enacted it was the general practice of private industry to pay some type of premium pay for holidays worked, and, as pointed out by Judge Madden in the majority opinion in the *Kelly* case, 119 Ct. Cls. 197, at 207, "in no case which we have heard of, or can imagine, could an employer maintain a practice whereby an employee who worked on a holiday received merely the same pay as one who did not work." The only available study for the period immediately preceding 1938 which is in any way illuminative of the situation respecting the payment of extra pay for holidays worked is that of F. Beatrice Brower for the National Industrial Conference Board, New York City (1937), "Personnel Practices Governing Factory and Office Administration." The study covered some 350 industrial concerns. The report found that over 60 per cent of these companies paid some type of premium or gratuity to their employees for work performed on holiday, the extra pay varying from one and one-quarter times the regular rate up to double time.

ceived gratuity pay on holidays which fell on a day such as Sunday when the employee would not have worked in any event.

The 1938 Resolution was brought into existence to correct an injustice to wage-rate employees which grew out of an Executive Order, dated December 6, 1937, excusing federal employees from duty on December 24, 1937.[6] Since the Executive Order failed to provide pay for the holiday, wage rate employees lost their wages for the day. To remedy this situation, Representative Ramspeck introduced a Resolution[7] in the House of Representatives, providing compensation for such employees who were excused from duty on that day. This Resolution was referred to the Committee on Civil Service. The Committee was advised by the United States Civil Service Commission that "there is the broader question involved of securing statutory authority for such payments as a general practice and thus obviate the necessity for special resolutions by Congress." H.R. Rep. No. 2683, p. 2. Petitioner relies upon this statement in support of its contention that Congress intended a broad general revision of holiday pay practices in the federal government. It is clear, however, that the Commission's statement fails to support petitioner's contention since it refers solely to the recurring problem of Executive Order holidays and merely suggested amending the Resolution so that it would cover future similar situations.

The immediate purpose of the 1938 Resolution was to eliminate the loss of wages by wage rate employees caused by uncompensated Executive Order holidays. This intent is readily apparent from the following colloquy between Mr. Ramspeck and Mrs. Rogers on the floor of the House during passage of the Joint Resolution. 83 Cong. Rec. 9466 (1938):

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[6] Executive Order No. 7763, dated December 6, 1937; see H.R. Rep. No. 2683 (1938), 75th Cong., 3rd Sess.

[7] H.J. Res. 551 introduced on January 5, 1938.

"MR. RAMSPECK: This covers the lowest-paid group of employees in the Government service. It is those who work on a per diem basis. For instance, last Christmas Eve the President excused all Government employees from rendering any service. His Executive Order, of course, applied to every employee in the Government service. Those who are working on a monthly salary got their pay for Christmas Eve, but those who work on a per diem were forced to take the day off, and they lost the day's pay. This is simply to correct that situation.

"MRS. ROGERS: This simply prevents an unintentional discrimination.

"MR. RAMSPECK: That is correct. The per diem employees are unintentionally discriminated against."

Prior to the 1938 Resolution, there was no statute which provided gratuity pay for Executive Order holidays or days when the Government departments were closed by Executive Order. In addition to providing gratuity pay for Executive Order holidays for wage rate employees, the 1938 Resolution also increased the number of employees entitled to such pay. It covered all regular wage rate employees of the federal government as compared with the more limited scope of prior holiday statutes.[8] Thus, it is clear that, far from a purpose *to abolish*, the primary purpose was *to broaden* the scope of prior holiday statutes.[9]

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[8] The 1885 Resolution was limited to employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving and other per diem employees in the United States. Temporary per diem employees and per diem employees whose duties were not in a recognized trade or craft were excluded from its benefits. The 1895 Resolution covered only employees of the Government Printing Office. 14 Comp. Gen. 818, 820 (1935); 16 Comp. Gen. 912 (1937).

[9] H.R. Rep. No. 2683, 75th Cong., 3rd Sess. 2 (1938) contains a letter from Harry B. Mitchell, President of the Civil Service Commission, to Congressman Ramspeck, which states: "It is believed that the President had in view that the benefits of the holiday be accorded to all classes of employees to the greatest extent possible."

Petitioner contends that Committee Report No. 2683 establishes that Congress intended to deprive wage rate employees of gratuity pay when required to work on a statutory holiday. To support its conclusion, petitioner refers to certain passages appearing in the Acting Comptroller General's letter to the Secretary of the Navy, which was included in the Committee Report. Petitioner emphasizes that the letter points out in two places that wage rate employees required to work on a holiday receive "double pay". It relies upon such references as evidence of a legislative intent to deprive wage rate employees required to work on a holiday of their gratuity pay. Examination of the references upon which petitioner relies reveals that petitioner is confused with respect to one reference (H.R. Rep. 2683, p. 4) and inaccurate with respect to the other (H.R. Rep. 2683, p. 5). The reference on page 4 of the Report refers to the right of wage rate employees "to extra pay at a higher rate for all services rendered outside of regular business hours. . . ." Obviously, this reference is to premium or overtime pay as distinct from gratuity pay. The other reference on page 5 of the Report, upon which Petitioner relies, reads as follows:

> ". . . when any of such holidays falls on a nonwork-day (such as a Saturday), such employees receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned, and double compensation for the day if work is performed thereon."

It is clear that this passage does not refer to gratuity pay for wage rate employees required to work on a statutory holiday occurring on a *regular work day*. The reference to "double compensation" relates to the payment of such compensation to wage rate employees required to work on a statutory holiday occurring on a *nonwork* day. Clearly, if gratuity pay is eliminated for statutory holidays occurring on nonwork days, the employee required to work on

such days would not receive "double compensation", but would merely receive his regular rate of pay for the day. Thus, it is apparent that the Committee Report did not, as petitioner contends, specifically deal with the subject of gratuity pay for employees required to work on statutory holidays occurring *on regular work days.*

The significance of the phrase in the 1938 Resolution, "Whenever . . . employees . . . are relieved or prevented from working solely because of the occurrence of a holiday" must be viewed against the background of the affirmative policy of Congress to improve substantially the holiday pay status of wage rate employees and to remedy discrimination against them as reflected in Committee Report No. 2683, p. 22. Conceding that the phrase is a limiting one, the extent of the limtiation must be derived from an examination of the cause which inspired it as revealed by the available legislative material. The scope of such limitation is readily perceived in Committee Report No. 2683, which establishes that the phrase is merely intended to limit holiday gratuity pay to holidays which occur on regular work days. The letter from the Acting Comptroller General contained in Committee Report No. 2683, pages 3-5, pointed out in the language quoted above that under existing holiday statutes wage rate employees were entitled to gratuity pay for holidays which fell on nonwork days. The quotation from this letter continues as follows:

> "During the calendar year 1936 navy yard per diem employees, as well as other per diem employees of the Government to whom the 40-hour-week statute is applicable, were paid 3 days gratuity pay under the holiday statutes, over and above their full earnings for the year, by reason of the fact that February 22, May 30, and July 4, 1936, fell on Saturday nonwork days. (See 15 Comp. Gen. 700; *id.* 809.) It is noted in this connection that December 25, 1937, and January 1, 1938, each will fall on a Saturday."

The legislative history of the 1938 Resolution is wholly devoid of any evidence that Congress intended any limitation of gratuity pay granted by prior holiday statutes other than the elimination of gratuity pay for holidays occurring on nonwork days. Thus it is apparent that petitioner seeks, without basis, to extend the scope of the limitation to deprive respondents of their right to gratuity pay when required to work on a statutory holiday occurring on a regular work day. The court below rejected petitioner's contention with the following quotation from that court's language in the earlier *Kelly* case, *supra:*

> "One has immediate doubts as to whether Congress, in 1938, intended to take away from this class of Government employees these rights which they had enjoyed at least since 1895. And when one examines the origin and purpose of the legislation, he finds not the remotest intimation of any such intent. The resolution as originally introduced provided merely that per diem employees should be paid for the December 24, 1937, special holiday. It was amended so that it would serve as permanent legislation for all such occasions. The Civil Service Commission and the House Committee in enlarging the scope of the resolution obviously had noted the Comptroller General's comment, quoted in the committee report, that the existing legislation had been so interpreted as to give employees pay for a holiday coming on a day when they would not have worked anyway. To prevent that unduly generous treatment, the language 'whenever . . . employees . . . are relieved or prevented from working solely because of the occurrence of a holiday' was inserted. The words were apt for that purpose. Hence we are not asked by the plaintiffs to disregard, or nullify, words of a statute on the ground that Congress used them inadvertently. They had a purpose and were, for that purpose well chosen. We are asked only to hold that they should not be given an additional application, which, taken literally, they could receive, when all the indications are that they were not meant to have it.
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> "This being the situation, we think that the administrative officers of the Government and the courts have no duty, and indeed no right, to attribute to Congress an intention which, it is morally certain, Congress did not have, by giving to words which Congress used for one obvious purpose, an additional application which, taken literally, they might support. The evil which Congress meant to cure by the words it used, it cured. The additional effect contended for by the Government would destroy a practice which no one had ever even intimated to be an evil, and which responsible officials had, for more than forty years regarded as just and necessary."

E. THE CONTENTION OF PETITIONER THAT CONGRESS INTENDED THE 1938 RESOLUTION TO EQUALIZE THE HOLIDAY PAY STATUS OF PER DIEM AND PER ANNUM EMPLOYEES IS WITHOUT MERIT AND FINDS NO SUPPORT IN THE LEGISLATIVE HISTORY.

Petitioner contends that Congress intended to deprive wage rate employees of their traditional right to gratuity pay when required to work on a holiday occurring on a regular work day in order "to equalize the position of per diem and per annum workers with respect to holiday pay". The court below in the *Kelly* case, *supra,* disposed of that contention in the following language:

> "The Government suggests that the fact that per annum employees, at that time, received no extra pay when they were required to work on a holiday was a discrimination, which the Government's interpretation would eliminate. But that difference had existed for some forty-five years, no mention had been made of it in connection with this legislation, and there is no basis whatever for thinking that Congress intended to treat it. It was apparently a recognized difference between the status of a per annum employee with his relatively secure tenure, and a per diem craftsman."

Not only is there a complete absence of evidence in the legislative history to support petitioner's argument that the 1938 Resolution was enacted to equalize the holiday status of per annum employees with wage rate employees,

but the expressed legislative purpose of the 1938 Resolution was to prevent "an unintentional discrimination" against "the lowest-paid group [wage rate] of employees in the Government Service." These two factors demonstrate that there is no basis in the legislative history of the 1938 Resolution to support petitioner's argument.

Petitioner's assumption that Congress intended to equalize the holiday pay status of wage rate and per annum employees is predicated upon an erroneous conception that wage rate employees in fact enjoyed preferential treatment as compared with per annum employees. On the contrary, at the time of the enactment of the 1938 Resolution, the Government's over-all compensation policy for holidays and other nonwork days was substantially superior for per annum employees. In 1938, per annum employees were paid for every day of the year, and could be required to work on all Saturdays, Sundays and holidays (Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Federal Government, at p. 93). However, most per annum employees were not required to work beyond their regular work week. On the other hand, in 1938, wage rate employees were not paid for nonwork days such as Saturdays or Sundays,[10] unless required to work on such days. Indeed, in the case of many hourly rate employees, there is no guaranteed work week and they may be laid off with only part of a day's earnings because there is insufficient work to keep them occupied for a full day. Thus, a discrimination existed, in fact, in favor of per annum employees.

Petitioner's argument also presumes that there is a single holiday pay standard which Congress sought to achieve by the simple expedient of depriving wage rate employees of gratuity pay when required to work on a statutory holi-

[10] The sole exception was the occasional instance when wage rate employees received gratuity pay when a statutory holiday occurred on a nonwork day.

day. It assumes that all federal employees are divided into two general classifications, per annum employees and wage rate employees. Further, it assumes that all per annum employees are treated similarly with respect to holiday compensation, and that the same is true for all groups of wage rate employees. Petitioner fails to recognize that with respect to holiday pay practices as well as general employment conditions federal employees have traditionally been classified into numerous groups without uniform treatment. In a report by the Hoover Commission [11] concerning federal personnel pay practices, this lack of uniformity was clearly pointed out in the following language:

> "While 92 percent of all federal positions are subject to the same employment regulations, only 42 percent are subject to any single set of pay policies. In fact, federal employees fall into five distinct groups for pay purposes, and each group is subject to widely different policies.[12]

The wide variations in holiday pay practices among various groups of federal employees are described by Ismar Baruch in *Federal Holiday Pay Policies, Personnel Administration*, Vol. 8, pp. 15, 17, as follows:

> "In the Federal Service, the statutes are not uniform on this point. Some groups are granted premium pay for holiday work; some are permitted compensatory time off in lieu of extra pay; and some receive only the

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[11] *Task Force Report on Federal Personnel* prepared for the Commission on Organiation of the Executive Branch of the Government, January, 1949, pages 43, 44. See also page 57.

[12] The five groups are listed as follows: (a) Classification Act (white collar) employees; (b) Wage Board (blue collar) employees; (c) Postal Service employees; (d) special legislative employees; custom clerk; Foreign Service; Immigration Inspectors; (e) excepted employees (R.F.C. and T.V.A., etc. employees).

same pay for holiday work as they would receive if they were officially excused from working on a holiday.[13]

The lack of uniformity in holiday pay practices and other employment conditions referred to by Mr. Baruch and the Hoover Report exists among various groups of per annum employees as well as among groups of wage rate employees.

Not only were there differences in holiday pay practices among various groups of wage rate employees [14] but there are also wide differences among different groups of per annum employees. For example, certain per annum employees of the Treasury Department required to work on a holiday in 1938 were entitled to three times their basic rate of compensation for such days of work.[15] Others, such as per annum employees of the Superintendent of Documents, receive the same compensation for work on holidays as is ". . . allowed . . . [wage rate] employees of the Government Printing Office. . . ." [16]

The court below in the *Kelly* case pointed out that the foregoing differences in holiday pay practices as well as differences in conditions of employment among the various groups of federal employees had existed for many years. Indeed, Congress still recognizes that differences in premium and holiday pay practices exist. The Committee on Post Office and Civil Service of the United States Senate, in its report on the Federal Employees Pay Act of 1952 recommended that:

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[13] The extent of the widely varying holiday pay practices applicable to Federal employees is also readily perceived from an examination of Part VIII of *The Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Government, supra*, at pp. 93-98.

[14] For example, the 1895 Act grants a statutory holiday (Inauguration Day) to employees of the Government Printing Office which has not been allowed *by statute* to any other wage rate employees up to the present.

[15] Act of February 13, 1911, c. 46, § 5, 36 Stat. 901, U.S.C. 26.

[16] Act of March 4, 1925, c. 549, § 1, 43 Stat. 1300, 44 U.S.C. § 73.

> "Development of a single overtime, night, and holiday pay plan for application throughout the Federal service would be undesirable at this time. So long as fundamentally different base pay plans exist, it is logical to continue correspondingly different premium pay plans.[17]

Since a subsequent Senate Committee recognized that the development of a uniform holiday pay plan today would require consideration of numerous interrelated factors such as base pay differences only after a thorough study, it is illogical to assume that Congress would have sought to "equalize" the holiday pay status of all federal employees in 1938 without either Committee Hearings or reference thereto in the Committee Report.

III.

THE GOVERNMENT'S CONSTRUCTION OF THE 1938 RESOLUTION WOULD PRODUCE ABSURD AND INEQUITABLE RESULTS.

While, as noted by the Government in its brief (p. 33), the Comptroller General may in practice apparently authorize payment of a full day's wages even though only a part of a day is worked, query whether this ruling of the Comptroller General is valid if the 1938 Resolution is to be given the construction contended for by the Government or is to be read as literally as the Government would have it read. Thus, the possible absurdity mentioned by this Court in *Kelly*[18] is still relevant. In any event, there are other equally if not more absurd results consequent upon the Government's reading of the 1938 Resolution. One of these results is already manifested in decisions of the Comptroller General following the 1938 Resolution. See Decision A97265, August 29, 1938, which holds that an employee who was not required to work on a designated holiday oc-

[17] Committee Report No. 843, 82d Cong., 1st Sess. (1951), page 3.
[18] *United States* v. *Kelly*, 342 U.S. 193, at 194, footnote 4.

curring on a workday must nevertheless show facts and circumstances to prove that he would have worked but for the sole fact that it was a holiday. In other words, under the Government's interpretation, unless an employee is in fact ready, willing, and able to go to work on the designated holiday, he is not entitled to gratuity pay, despite the fact that he was not required to work on that day. Furthermore, it is to be noted that under the Government's construction of the 1938 Resolution and under the ruling of the Comptroller General in the present case, an employee who is required to work on a holiday occurring on a regular workday receives the same pay as but no more than the employee who stays at home. Certainly it is not to be presumed, without very clear language or without a very clear expression of intent in the legislative history, that Congress was desirous of bringing about such an obviously inequitable result. This Court will not construe statutes to produce absurd or inequitable results. *Helvering* v. *Hammel*, 311 U.S. 504, 511 (1941); *United States* v. *Katz*, 271 U.S. 354, 362.

IV.

THE COMPTROLLER GENERAL'S INTERPRETATION OF THE 1938 RESOLUTION AND THE ANNOTATION IN THE UNITED STATES CODE RELATIVE TO THE 1938 RESOLUTION ARE ENTITLED TO NO WEIGHT.

The Comptroller General's interpretation of the 1938 Resolution is entitled to no weight because it is predicated upon the erroneous assumption that the 1938 Resolution flatly repealed holiday statutes *in pari materia* which grant gratuity pay.[19] It has been demonstrated that the 1938 Resolution merely modified prior holiday statutes *in pari materia* and did not repeal them. See *John Di Benedetto* v. *United States, supra.* The law is settled that statutes in

[19] 18 Comp. Gen. 191, 192 (1938).

pari materia must be construed together, giving effect if possible to the legislative policy embodied in those prior statutes. Thus, it is evident that the Controller General's decision are entitled to no consideration because they made no effort to reconcile the provisions of the 1885 Resolution and the 1895 Act with the 1938 Resolution.

Petitioner claims that the interpretation of the 1938 Resolution of the House Committee on Revision of Laws, as reflected in the annotations to 5 U.S.C. 86 and 44 U.S.C. 44 in the 1940 edition of the United States Code are entitled to great weight. There is no merit to this contention because the Committee does not purport and has no authority to construe statutes.[20]

In *Murrell* v. *Western Union Tel. Co.*, 160 F. 2d 787, 788 (C.A. 5th, 1947), the court held as follows:

> "The United States Code was not enacted as a statute, nor can it be construed as such. It is only a *prima facie* statement of the statute law. The statutes collected in it did not change their meaning nor acquire any new force by their inclusion. *If construction is necessary,* recourse must be had to the original statutes themselves. Section 2(a) of the Act of June 30, 1926, 44 Stats., Part I, Page 1." (Emphasis supplied.)

The cases relied upon by petitioner (Brief, pp. 34-5) to support its contention that the annotations are entitled to great weight do not support its contention. Those cases merely hold that where there is no inconsistency between the United States Code and the Statutes at Large, the Code shall constitute *prima facie* evidence of the law.

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[20] The House Committee on Revision of Laws merely supervised the consolidation of the Code. "The actual work of preparing and editing the material . . . was done by the West Publishing Co. . . . and the Edward Thompson Co. . . ." Preface to 1946 Ed. page IX, United States Code.

V.

THE WARTIME POLICY REQUIRING GOVERNMENT EMPLOYEES TO WORK ON HOLIDAYS DOES NOT DEPRIVE WAGE RATE EMPLOYEES OF THEIR RIGHT TO GRATUITY PAY ALLOWANCE WHEN REQUIRED TO WORK ON STATUTORY HOLIDAYS.

Petitioner claims that the court below overlooked the fact that the holidays involved herein occurred during the war period (Pet. Br. 35). It asserts that the promulgation of a wartime policy of requiring employees to work on days normally observed deprives Respondents of their right to gratuity pay. However, petitioner fails to show that the wartime policy is relevant to the issue in this case. Clearly, this policy, promulgated in 1943, has no significance in determining what Congress intended when it enacted the 1938 Resolution almost five years earlier, during a period of peace, and when the considerations justifying, indeed requiring, holiday pay allowances for per diem workers as enumerated on page 35 of petitioner's brief (set forth this brief, *supra*, p. 8) were entirely applicable.

The court below disposed of petitioner's "wartime policy" contention as follows:

> "The fact that during this period the Secretary of the Navy, in accordance with a directive of the President, issued a directive that holidays, with the exception of Christmas, be considered as regular work days, would have nothing to do with the issue here. If the Government required per diem employees to work on holidays it should pay for such services."

Further, as will be demonstrated hereafter, the wartime policy does not, in and of itself, bar the payment of gratuity pay to wage rate employees required to work on a statutory holiday. The memorandum of May 12, 1943, merely informed the heads of executive departments and agencies that "days normally observed . . . as holidays should with the excep-

tion of Christmas be considered as regular work days for the duration of the war."[21] On December 17, 1943, a similar memorandum was sent to heads of executive departments and agencies. This memorandum contained the observation that holiday work is performed by federal employees without additional compensation. These memorandum are the basis of the wartime policy upon which petitioner relies in support of its argument. However, the only significance of these memoranda is that they merely advised the executive heads of departments that days normally observed as holidays as a result of executive action, with the exception of Christmas, would be regular work days. Thus, for those per annum employees who normally received premium rates of pay for work on holidays, the basis of such payment was eliminated because holidays for per annum employees were not declared. The memoranda did not and could not refer to wage rate employees, because holidays for such employees are allowed by statute[22] as distinct from executive action.[23]

Petitioner argues that Respondents were not entitled to "premium pay" during the war period because normal

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[21] *Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Federal Government, supra,* at p. 94.

[22] See decision of the Comptroller General, 22 Comp. Gen. 1054, in which he pointed out that: "Presidential or administrative orders requiring work on legal holidays during the war emergency do not and cannot change the status of such [statutory] holidays for the purpose of applying statutes and regulations having the force and effect of law granting rights and benefits on the basis of the holidays."

[23] Petitioner Brief, p. 36) relies upon the Federal Employees Pay Act of 1945 to support its wartime policy argument. However, the Committee Report accompanying the Act conclusively establishes that Congress recognized that the only holidays allowed per annum employees were those provided by executive declaration. The report states at page 13, "As to any given holiday, it [Section 302 of the Act] could take effect earlier if the President has declared that such a holiday shall not be generally a work day in the Federal Service. Such a declaration already exists with respect to Christmas." H.R. Rep. No. 726, 79th Cong., 1st Sess.

peacetime holidays were converted into regular work days. Petitioner's argument is without substance because it wholly ignores the legal basis upon which wage rate employees are entitled to holiday pay with respect to the holidays involved in this case. Respondent submits that although the days normally observed as holidays were regular work days for per annum employees, such days were in fact statutory holidays for wage rate employees. In *Di Benedetto* v. *United States*, 108 C. Cls. 18, 24, 25 (1947), cert. denied 332 U.S. 763 (1947), the court pointed out that the 1885 Resolution is "limited to per diem employees" and had no "application to the plaintiff who is paid on a per annum basis."[24] The court stated at page 25 with respect to per annum employees:

> "There is no statute defining any day as a day on which they may not be required to work, or as a holiday for any purpose, in relation *to them* [per annum employees]. The days on which they have customarily been excused, before and since the war period have been determined by the executive branch of the Government." (Emphasis supplied.)

Although the court denied premium pay to per annum employees in the *Di Benedetto* case, it clearly indicated that if statutes allowing holidays for wage rate employees had also been applicable to per annum employees, the latter would have been entitled to premium pay. In any event, petitioner has already conceded that respondents are entitled to premium rates of pay for work on statutory holidays. Thus, it is clear that petitioner cannot now argue consistently that the wartime policy prohibits the payment of gratuity pay to wage rate employees.

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[24] The Government's Brief in Opposition to the Petition for a Writ of Certiorari in the *Di Benedetto* case, emphasized that the holiday statutes involved herein were not applicable to per annum employees, as distinct from wage rate employees.

CONCLUSION

For the reasons set forth in this brief, it is respectfully submitted that the decision of the court below should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 17.—October Term, 1956.

The United States, Petitioner, *v.* Alfred C. Bergh, et al.	On Writ of Certiorari to the United States Court of Claims.

[November 19, 1956.]

Mr. Justice Clark delivered the opinion of the Court.

This action was instituted in the United States Court of Claims by government per diem employees to recover holiday pay consisting of an extra day's compensation for each holiday worked during the year 1945.

Each of the respondents was employed by the Navy under a Schedule of Wages which provided that "whenever an employee is relieved or prevented from working solely because of the occurrence of any day declared a holiday" he was to receive the same pay for such days as for other days. This language was taken from a Joint Resolution of Congress of June 29, 1938, 52 Stat. 1246,[1]

[1] Joint Resolution of June 29, 1938, c. 818, 52 Stat. 1246, 5 U. S. C. § 86a:

". . . [W]henever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

"Sec. 2. The joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict."

having to do with holiday pay. In 1945 the respondents were not relieved from working on certain holidays named in this Resolution and were paid only the regular scheduled pay for the work performed on those days. They contend that under a Joint Resolution of January 6, 1885, 23 Stat. 516,[2] they have a vested right to an additional full day's wage as "gratuity pay" for each holiday worked. The Government urges that the 1885 Resolution was repealed *in toto* by the Joint Resolution of June 29, 1938, or in the alternative that the latter is inconsistent and in conflict with the provisions of the earlier Resolution upon which respondents rely.

The Court of Claims entered judgment for respondents, believing that the issue "was considered and disposed of by [its] majority opinion in Kelly v. United States, 119 C. Cls. 197," holding that the employees involved were entitled to gratuity pay under Joint Resolution, as well as under their wage agreement negotiated through collective bargaining in 1924. 132 Ct. Cl. 564, 132 F. Supp. 462. While we affirmed *Kelly's* case, 342 U. S. 193, it was on the basis of the wage agreement present there. We left open the issue involved here. Subsequently, thousands of claims based on the 1885 Resolution, including those of respondents, were filed against the Government necessitating a decision on the question now presented. We granted certiorari, 350 U. S. 953.

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[2] 23 Stat. 516 (1885), as amended, 24 Stat. 644 (1887), 5 U. S. C. (1934 ed.) § 86, which provides:

". . . The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States shall be allowed the following holidays, to wit: The 1st day of January, the 22d day of February, the day of each year which is celebrated as 'Memorial' or 'Decoration Day', the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days."

The legislative history of the 1938 Resolution is clear. Executive Order No. 7763 of December 6, 1937, 2 Fed. Reg. 2685, excused all government employees from work on December 24, 1937. Under the 1885 Resolution per diem employees received no compensation for that day since the holidays enumerated therein did not include December 24. A Joint Resolution was introduced in the House by Representative Ramspeck to allow holiday pay to per diem employees for that day. On referral to the House Committee on Civil Sevice, advice was sought from the Civil Service Commission, the Bureau of the Budget, and the Comptroller General. The Civil Service Commission advised by letter dated February 15, 1938, that the "accounting authorities, however, have held that in the absence of specific legislation the regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis lose pay for that day. This has resulted in discrimination against these groups of Federal employees." The Commission advised, further, that "there is the broader question involved of securing statutory authority for such payments as a general practice . . . ." H. R. Rep. No. 2683, 75th Cong., 3d Sess. 2. The Commission suggested the language that might be inserted in a Resolution that "would give permanent statutory authority" for holiday pay. In addition, the Commission's reference to the "accounting authorities" revealed that the Comptroller General had advised the Secretary of the Navy on December 20, 1937, that under existing law (a) per annum employees suffered no loss of income as the result of holidays, whether declared by statute or executive order, whereas per diem employees received pay only for those holidays enumerated in the 1885 Resolution; (b) per diem employees received statutory holiday pay whether the holiday happened to fall on a nonwork day (Saturday or Sunday) or not, while per annum workers were allowed

neither additional pay nor holiday time when the holiday happened to fall on a nonwork day; and (c) if a per diem employee worked on a statutory holiday falling on such a nonwork day, he received double pay.[3]

In its Report, *supra*, to the House, the Committee incorporated the letter from the Commission, the advisory opinion of the Comptroller General, and a letter dated February 14, 1938, from the Bureau of the Budget advising that the proposed legislation would not be "in conflict with the program of the President." The Committee drafted an entirely new Resolution, incorporating the language suggested by the Commission, intending for it to cover the "general practice" of the Government in regard to holiday pay. The only legislation then covering the general practice of the Government as to holiday pay was the 1885 Resolution and as to it the Committee categorically declared in its Report:

> "Section 2 [of the Resolution] proposes to repeal the joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), which is as follows: . . ." [It then sets out in full the 1885 Resolution.]

Furthermore, there is no indication anywhere in its Report that any portion of the 1885 Resolution—much less any administrative practice thereunder—was to survive. In addition to this unequivocal statement that the purpose of the 1938 Resolution was to repeal the 1885 one, the Committee further revealed by its action under the Rules of the 75th Congress that it so intended. The Rules required a Committee reporting out a bill repealing an act or part thereof to include in its report the text of the act or part thereof proposed to be repealed. The Report here included the text of the 1885 Resolution

[3] This double pay resulted from interpretation of the 1885 Resolution by the office of the Comptroller of the Treasury. 13 Comp. Dec. 40. See also, 13 Comp. Gen. 295, 297.

in toto. On the other hand, if it was intended only that the 1885 Resolution be amended the Rules required the Committee to insert in its report a comparative print of the part of the Act which it proposed to be amended. Here no such comparative print was inserted.

Moreover, the few brief statements on the floor of the House show nothing to the contrary. Representative Ramspeck declared that the Resolution "gives the same right to per diem employees as to regular monthly employees." Representative Rogers stated, "This simply prevents an unintentional discrimination." Nothing was said as to the 1885 Resolution, nor did anyone contend, contrary to the Committee Report, that it was not the intention to repeal it *in toto*. See 83 Cong. Rec. 9465–9467.

It is contended that the purpose of the 1938 Resolution was to increase the number of holidays for per diem employees to include those allowed by Executive Order, but to leave intact the allowance of double pay for per diem employees who worked on the holidays specified in the 1885 Resolution. This cannot be correct, for no one contends that the 1938 Resolution did not repeal the 1885 Resolution, as interpreted, with reference to holiday pay on *nonwork* days. That being so we cannot see why the 1885 Resolution should be regarded as having been left unrepealed with reference to holiday pay on *work* days.[4] Moreover, respondents' contention is entirely untenable in light of the Committee Report. Confusion would be created rather than eliminated if the contention

[4] It is true that the Comptroller General's 1937 letter pointed up the discrimination between per annum and per diem employees on *nonwork* days. But, even though not specifically adverted to, it would seem that a similar discrimination was also apparent as to *work* days in that per annum employees would receive no extra pay, while per diem employees would receive not only their regular wage but an equal amount as holiday pay.

were accepted. The purpose as shown by the letters, the advisory opinion, the Report, and the statements on the floor of the House, was to alleviate discriminations as to holiday pay and to treat employees alike insofar as possible. This the 1938 Resolution accomplished. Should the respondents' interpretation prevail it would result in a double standard of pay for per diem employees working on holidays. On those holidays included in the 1885 Resolution, the employees would receive double pay, while on holidays included in or created pursuant to the authority provided by the 1938 Resolution alone they would receive only single pay. This result is required because the 1938 Resolution permits no holiday pay when the employee is required to work. We cannot attribute such anomalous results to the Congress. It is urged that our interpretation would result in a per diem employee receiving the same pay for working on a holiday as is received by his fellow employee who is excused from so working. But this is no discrimination as it likewise is visited upon the per annum employee.[5]

We now turn to other indications supporting the position that the 1885 Resolution was repealed. As we indicated earlier, the double payment for holiday work recognized prior to the 1938 Resolution came about in 1906 through an interpretation of the 1885 Resolution by the Assistant Comptroller of the Treasury. This ruling was recognized by all departments and agencies of the Government until August 1938, when the Comptroller General held that the 1885 Resolution had been repealed by the 1938 Resolution and gratuity pay for holidays was no longer a right of per diem employees.[6] This opinion

[5] Moreover, the Schedule of Wages here provided for 50% additional pay for work required on holidays not included in the regular tour of duty and 125% additional for work in excess of eight hours on such days.

[6] 18 Comp. Gen. 10, 13; 18 Comp. Gen. 186.

was followed consistently by all of the departments and agencies of the Government. In this regard it is of importance to note that several efforts were made to repeal this interpretation by specific Act of Congress, but in each instance the bill failed to pass.[7] This contemporaneous interpretation of the 1938 Resolution by the agency charged with its supervision—an interpretation followed by all agencies of the Government—together with acquiescence of the Congress, must be given great weight.

Likewise it is noted that the House Committee on the Revision of Laws has similarly treated the 1938 Resolution. In the 1940 and 1946 recodifications of the United States Code the 1885 Resolution is listed as being repealed by the later Resolution of 1938. Again in the 1952 edition of the Code the 1885 Resolution is not only listed as repealed but its entire text is omitted from the Code. An explanatory notation states that this Resolution was repealed and is now covered by § 86a which is the 1938 Resolution.

As we noted earlier, this case is not disposed of by *Kelly* v. *United States*, 342 U. S. 193, and nothing in *Kelly* lends support to the employees' argument here. Kelly was a printer employed at the Government Printing Office. The wages of employees in Kelly's office were fixed by a collective-bargaining agreement pursuant to the Act of June 7, 1924, 43 Stat. 658. This Act though

[7] H. J. Res. 303, 76th Cong., 1st Sess.; H. R. 1386, 77th Cong., 1st Sess.; S. 1930, 77th Cong., 1st Sess.; H. R. 6222, 77th Cong., 1st Sess.; S. 1679, 79th Cong., 2d Sess.

The policy of allowing gratuity pay for holidays worked in peacetime and of prohibiting it in wartime is reflected in a section of the Federal Employees Pay Act of 1945, 59 Stat. 298, 5 U. S. C. § 922. This section provided for gratuity pay for holidays worked but was not to go into effect until the cessation of hostilities in World War II. By implication then, there was no gratuity pay allowed by statute for holidays worked during wartime.

amended, remained in effect as to the provisions involved here at the time of Kelly's claim. The contract Kelly sued on was entered into by the Government under this Act. We said the problem was "whether the [1938] Resolution somehow precludes the awarding of the gratuity pay which the agreement [so made] seems to grant." 342 U. S., at 194. We held that "since the agreement provided for gratuity pay for holidays worked, [Kelly] . . . was entitled to such pay." [*] The award to Kelly, then, was solely on the basis of the collective-bargaining agreement. Here there is no such agreement. There is nothing on which the employees can rely which affirmatively grants the double pay they claim.

The judgment of the Court of Claims is, therefore,

Reversed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

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[*] Kelly also claimed under a Joint Resolution. The Resolution of 1885 provided for "gratuity pay" for holidays for *all* government per diem employees. A Joint Resolution of 1895 referring specifically to Government Printing Office employees is substantially identical in regard to holiday pay with the 1885 Resolution. The *Kelly* case was considered on the basis of the 1895 Resolution, but the Court was not required to determine whether Kelly was entitled to any pay under that Resolution.

SUPREME COURT OF THE UNITED STATES

No. 17.—October Term, 1956.

The United States, Petitioner, v. Alfred C. Bergh, et al.	On Writ of Certiorari to the United States Court of Claims.

[November 19, 1956.]

Mr. Justice Burton, with whom Mr. Justice Black and Mr. Justice Frankfurter concur, dissenting.

The issue before us is purely one of statutory construction. For the reasons hereafter stated, we believe that the Court has misconstrued the Resolution of 1938 by treating it as completely repealing the Resolution of 1885 and all other prior holiday pay statutes. Our conclusion is based upon (1) the long-established practice under the Resolution of 1885, as amended, of allowing a full day's gratuity pay to per diem employees on holidays, whether or not those employees also received pay for services actually rendered on those days; (2) the language of the 1938 Resolution; (3) the circumstances which led to the presentation of the 1938 Resolution; and (4) the legislative history of its consideration by Congress.

The Joint Resolution of January 6, 1885, 23 Stat. 516, 5 U. S. C. (1934 ed.) § 86, provided—

> "That the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth

> day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days." [1]

This Resolution was interpreted repeatedly by the Comptroller of the Treasury, the Comptroller General of the United States, and later the Court of Claims, as allowing the designated per diem employees, on the specified holidays, their regular rate of pay as a gratuity, whether or not they worked on those days. Those who worked on such holidays received their scheduled pay for such work in addition to the holiday gratuity.[2] The administrative practice conformed to this interpretation.

This interpretation and the reason for it is made clear in the following quotation from the Comptroller of the Treasury:

> "I can not reconcile with any ideas of equity and justice the proposition that Congress ever intended by this or any other statute to allow the employees (and we are now speaking of per diem employees who are paid from a lump sum and not a stated, fixed annual salary) a legal holiday with pay, and place it in the power of yourself or any other person to cause any such employee to work on such day, such em-

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[1] In 1887 a fifth holiday was added—Memorial Day. Joint Resolution of February 23, 1887, 24 Stat. 644. For an earlier similar provision, applicable only to employees of the Government Printing Office, see 21 Stat. 304. A subsequent like provision for such employees, the Act of January 12, 1895, 28 Stat. 601, 607, was "consistently administered as providing for gratuity pay in addition to regular compensation if the employee worked on a holiday." *United States* v. *Kelly*, 342 U. S. 193, 195.

[2] See 8 Comp. Dec. 322 (1901); 13 Comp. Dec. 40 (1906); 21 Comp. Dec. 566 (1915); 22 Comp. Dec. 404 (1916); 24 Comp. Dec. 218 (1917); 24 Comp. Dec. 529 (1918); 3 Comp. Gen. 411 (1924); and 15 Comp. Gen. 809 (1936). See also, *Kelly* v. *United States*, 119 Ct. Cl. 197, 206–207, 96 F. Supp. 611, 612–613.

ployee so working receiving just the same amount of pay for said day as those who are not compelled to work, and no more.

. . . . .

"The laborer is worthy of his hire and should have it when compelled to work on a holiday. The giving him pay for such a day when he does not work is the free gift of Congress, and I will not stultify such gift by taking away from him his pay on a day for which he worked because Congress saw fit to give him pay for legal holidays when he did not work.

"You are therefore authorized to pay to the employees named their wages for work done on Thanksgiving Day in addition to their pay as provided by said act of 1895." 8 Comp. Dec. 322, 325 (1901).

Thus, until 1938, it was the Government's settled practice to allow gratuity pay to per diem employees on the specified holidays, whether or not the employees performed work on those holidays. It was in that significant context, late in 1937, that the incident occurred which led to the House Joint Resolution of June 29, 1938, 52 Stat. 1246, 5 U. S. C. (1952 ed.) § 86a.

On December 6, 1937, the President, by Executive Order No. 7763, 2 Fed. Reg. 2685, closed the government offices and excused all government employees from work on Friday, December 24, the day before Christmas. As December 24 was not a holiday specified by the Resolution of 1885, as amended, the Acting Comptroller General by letter of December 20, 1937, advised the Secretary of the Navy that per diem employees of the Navy Department would not be entitled either to gratuity or scheduled pay for that day unless, of course, they earned the latter by working. The difficulty was that the government offices had been closed by an Executive Order whereas

the Resolutions limited the allowance of holiday gratuities to a list of statutory holidays.[3] The above-mentioned letter gave unquestioning recognition to the existing statutory authorization of gratuity pay for specified holidays, whether or not additionally compensated labor was performed on those days. It contained no suggestion that such payments were invalid or even unwise, except to point out that the existing law allowed such gratuities even when a holiday occurred on a nonworkday. On this point, the letter commented that "even when any of such holidays falls on a nonworkday (such as Saturday), such employees receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned, and double compensation for the day if work is performed thereon." H. R. Rep. No. 2683, 75th Cong., 3d Sess. 5.

With this situation before him, Representative Ramspeck of the House Committee on Civil Service introduced House Joint Resolution 551 providing that the "employees . . . who were excused from duty on December 24, 1937, by the Executive order of December 6, 1937, shall receive compensation for December 24, 1937, any law or regulation to the contrary notwithstanding." See 83 Cong. Rec. 9466.

This was referred to the Civil Service Commission which returned it with the suggested substitute which later became the Resolution of 1938. The Commission explained the need for the substitute as follows:

> "It is believed that the President had in view that the benefits of the holiday be accorded to all classes of employees to the greatest extent possible. The accounting authorities, however, have held that in

[3] The letter of December 20, 1937, appears in full in H. R. Rep. No. 2683, 75th Cong., 3d Sess. 3–5, relating to House Joint Resolution 551, later approved June 29, 1938, and now before us.

the absence of specific legislation the regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis lose pay for that day. This has resulted in discrimination against these groups of Federal employees.

"The proposed joint legislation provides for the payment of compensation to these employees to cover the single day, December 24, 1937; but there is the broader question involved of securing statutory authority for such payments as a general practice and thus obviate the necessity for special resolutions by Congress. Such a resolution, for example, was required last year to provide payment for these same classes of employees in Washington, D. C., who were excused from duty on January 20, 1937, the date of the inauguration of the President.

"It is believed that general legislation in the following phraseology would give permanent statutory authority for payments under the circumstances indicated:

" 'Hereafter, whenever regular employees of the Federal Government, whose compensation is fixed at a rate per day, per hour, or on a piece work basis, are relieved or prevented from working solely because of the occurrence of a holiday, such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the Departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

" 'SEC. 2. The joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), and all other laws incon-

sistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict.'" H. R. Rep. No. 2683, 75th Cong., 3d Sess. 2.[4]

The letters, constituting the Committee Report, thus pointed to the following changes to be accomplished by the new Resolution:

1. Extend the gratuity to include not only statutory holidays but also any holidays and other nonworkdays prescribed by Executive Order.

2. Extend the gratuity to cover all "regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis . . . ." *Ibid.*

The above extensions followed the suggestion of the Civil Service Commission that the new Resolution should answer "the broader question involved of securing statutory authority for such payments [as that of December 24, 1937] as a general practice and thus obviate the necessity for special resolutions by Congress." *Ibid.*

The new Resolution also met the implied criticism relating to the allowance of gratuities for holidays occurring on other than workdays. It did this by expressly limiting gratuity allowances to those days on which the employees "are relieved or prevented from working *solely* because of the occurrrence of a holiday such as New Year's Day . . . ." (Emphasis supplied.) 52 Stat. 1246. It thus excluded holidays when the relief from work was due in part to the day not being a workday without regard to its designation as a holiday.

The few brief statements made by the sponsor of the Resolution, Representative Ramspeck, at the time of its

[4] For the official text of the Resolution as approved June 29, 1938, see 52 Stat. 1246, 5 U. S. C. (1952 ed.) § 86a.

adoption, confirm the view that the Resolution was merely a corrective measure intended to aid "the lowest-paid group of employees in the Government service," rather than a measure designed to abolish substantial benefits enjoyed by per diem laborers under a 50-year-old governmental practice.[5]

It is hardly conceivable that, if either the sponsor of this Resolution or the Committee recommending its adoption had seen in it the deprivation of pay now contended for by the Government, the sponsor or the Committee would not have mentioned that effect in the presentation of the measure. The absence of any such mention is eloquent testimony that the Resolution had no such meaning. It is equally inconceivable that Congress would unanimously reduce the pay of the Govern-

[5] The following comprises nearly all that was said about the Resolution on the floor of the House:

"Mr. O'MALLEY. . . . What does this cover?

"Mr. RAMSPECK. This covers the lowest-paid group of employees in the Government service. It is those who work on a per diem basis. For instance, last Christmas Eve the President excused all Government employees from rendering any service. His Executive order, of course, applied to every employee in the Government service. Those who are working on a monthly salary got their pay for Christmas Eve, but those who work on a per diem were forced to take the day off, and they lost the day's pay. *This is simply to correct that situation.*

. . . . . .

"Mr. COLLINS. What does it have to do with?

"Mr. RAMSPECK. It covers only those cases where the President by Executive order excuses employees from a day's work. It gives the same right to per diem employees as to the regular monthly employees.

. . . . . .

"Mrs. ROGERS of Massachusetts. *This simply prevents an unintentional discrimination.*

"Mr. RAMSPECK. That is correct. The per diem employees are unintentionally discriminated *against*." (Emphasis supplied.) 83 Cong. Rec. 9466.

ment's lowest paid employees *sub silentio*. Read in its context, and in the light of the explanation, made on the floor, that this Resolution sought "simply to correct" such a situation as that which occurred on Christmas Eve, and to prevent an unintentional discrimination *against* per diem employees, it is difficult to read into the Resolution the meaning, contrary to their interests, for which the Government now contends.

The fact that, at the time the 1938 Resolution was enacted, it was the general practice of private industry to pay some type of premium pay for holidays worked emphasizes the unlikelihood of the interpretation contended for by the Government. In *Kelly* v. *United States*, 119 Ct. Cl. 197, 209, 96 F. Supp. 611, 614, the Court of Claims, in interpreting the 1938 Resolution, described the circumstances in that year as follows:

> "With regard to its per diem and per hour employees, the so-called wage board employees, the Government is in competition with private employers, and attempts to keep its wages and working conditions in step with those in private enterprise. It is completely unthinkable that the owner of a printing shop could, by practice, or by contract, maintain the policy as to holiday pay which the Government here seeks to attribute to Congress. Such an employer might, and many employers did, in 1938, have a policy of not paying for holidays not worked. If the holiday was worked, it was paid for. Some such employers then, and most of them now [1951] have contracts with their employees providing for paid holidays, but in all such contracts there is a provision that if the holiday is in fact worked, it will be paid for again, usually at premium pay, and in addition to the holiday pay. But in no case which we have heard of, or can imagine, could an employer maintain a

practice whereby an employee who worked on a holiday received merely the same pay as one who did not work." [6]

The foregoing changes in the existing law retained its general pattern. They clarified both the classes of per diem employees entitled to a holiday gratuity, and the occasions when that gratuity was to be payable. Nowhere in the Resolution or in its legislative history is there any express statement of the Government's present contention that an employee who comes within the statutory classification of eligibility for the holiday gratuity is deprived of it if he performs some compensated labor for the Government on the holiday in question.

The Government emphasizes the phrase, added in 1938, which states that its regular per diem employees shall receive holiday pay "whenever [they] are relieved or prevented from working solely because of the occurrence of a holiday . . . ." This is interpreted by the Court of Claims as eliminating gratuity pay for those holidays which occur on nonworkdays. It does this aptly because the occurrence of a holiday on a nonworkday obviously is not the *sole* cause preventing per diem employment on those days. The Government, however, suggests that this clause also means that if a per diem employee, who becomes entitled to gratuity pay solely because of the occurrence of a holiday on a workday, nevertheless responds to a call to work on that day, he loses the

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[6] See also, a study entitled "Personnel Practices Governing Factory and Office Administration," prepared in 1937 by F. Beatrice Brower for the National Industrial Conference Board, Inc., New York City. This covered about 450 industrial concerns employing wage earners totaling about 370,000. (P. 2.) Over 60% of such companies paid some type of premium or gratuity to their wage earners for work performed on Sundays or holidays, the *extra* pay ranging from 25% to 100%, in addition to the regular rate of pay. (Pp. 36–37.)

gratuity. Such an interpretation discriminates against the loyal holiday worker.

Moreover, such an interpretation produces the inequitable result that an employee who works on a holiday receives no more pay than an employee who is not required to work on the same holiday.

Concededly, this was not so before 1938. At least until then the 1885 Resolution was recognized as authorizing gratuity pay for holidays, whether or not work was performed on those days. Accordingly, in 1938, it would have been a simple thing to repeal the 1885 Resolution outright if that result were intended. Instead of doing so, the repealing section in the 1938 Resolution expressly limited itself to the inconsistencies and conflicts between, on the one hand, the new Resolution and, on the other, the 1885 Resolution and "all other laws inconsistent or in conflict with the provisions" of the new Resolution. Such a limited repeal well reflects the above-recited legislative history. It shows the character of the new Resolution to be that of corrective legislation in the interests of the laborers. To be sure, the House Committee Report in its treatment of § 2 of the new Resolution did set forth the text of the 1885 Resolution as that of the Resolution cited in that repealing section. That recital is not sufficient to change the specifically restricted repealing clause into an outright repeal in the face of its express limitation to inconsistencies and conflicts.

The Resolutions of 1885 and 1938 are *in pari materia* and should be read together. When so read, there is no basis for treating differently the several holidays specified in the Resolutions. No "double standard" results. The 1938 Resolution expands the statutory list of holidays to include various other days that might be designated by Executive Orders. None of the original list are excluded.

Petitioner cites no judicial decision upholding its interpretation. The Court of Claims has twice rejected it and taken the opposite view.[7]

Petitioner cites as authority for its position the brief rulings of the Comptroller General under the 1938 Resolution. Without reviewing the material which has influenced the Court of Claims, those rulings assume, without discussion or judicial support, that the Resolution of 1938 completely repealed the Resolution of 1885. See 18 Comp. Gen. 10, 16, 186, 191 (1938). The treatment of the amendment in the publication of the United States Code is not controlling and cites no judicial authority.

In *United States* v. *Kelly*, 342 U. S. 193, we held that per diem employees of the Government Printing Office were entitled to the gratuity pay guaranteed by their collective-bargaining agreement. We also said expressly that the 1938 Resolution "was silent on the subject of gratuity pay for holidays on which work was performed." *Id.*, at 195. The *Kelly* case thus shows that, at the very least, the gratuity policy of the 1885 Resolution is not prohibited after 1938. Accordingly, it would be consistent with that case to uphold the Court of Claims in the instant case. The collective-bargaining contract in the *Kelly* case was declaratory of, not contrary to, the policy of the 1885 Resolution.

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.

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[7] *Kelly* v. *United States* (two judges dissenting), 119 Ct. Cl. 197, 96 F. Supp. 611, aff'd on other grounds, *United States* v. *Kelly*, 342 U. S. 193; and the instant case, *Bergh* v. *United States* (one judge dissenting), 132 Ct. Cl. 564, 132 F. Supp. 462. See also, *Adams* v. *United States*, 42 Ct. Cl. 191, 212–213.